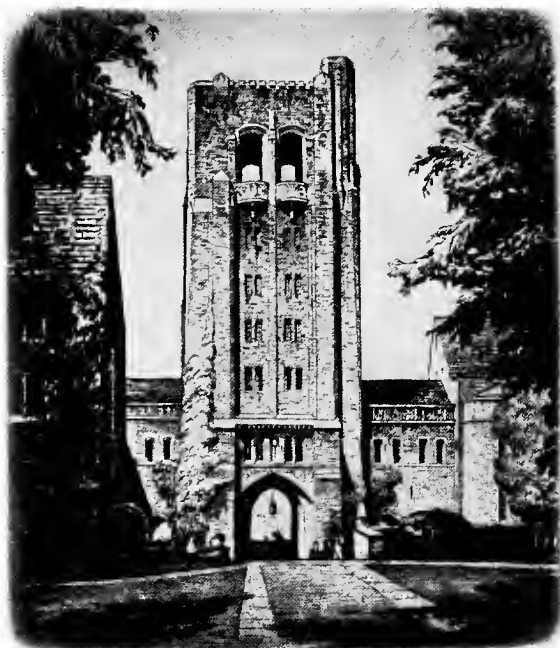


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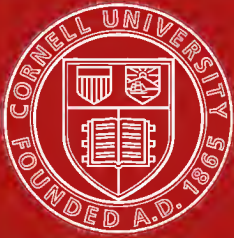
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A DIGEST

OF

THE REPORTED CASES

DETERMINED IN

The Superior Courts of Ontario,

AND

The Supreme Court of Canada,

CONTAINED IN VOLUMES

45-46 QUEEN'S BENCH.

27-29 CHANCERY.

1-4 ONTARIO REPORTS.

31-32 COMMON PLEAS.

5-8 APPEAL REPORTS.

8-9 PRACTICE REPORTS.

3-7 SUPREME COURT REPORTS.

1 HODGINS'S ELECTION CASES.

(BEING A CONTINUATION OF ROBINSON & JOSEPH'S DIGEST)

WITH

A TABLE OF CASES AFFIRMED, REVERSED, OR SPECIALLY
CONSIDERED.

Compiled by Order of the Law Society of Upper Canada,

BY

CHRISTOPHER ROBINSON, Esq.,

ONE OF HER MAJESTY'S COUNSEL,

AND

F. J. JOSEPH, Esq.,

OF OSGOODE HALL, BARRISTER-AT-LAW.

TORONTO :

ROWSELL & HUTCHISON.

1884.

1153

ENTERED according to the Act of the Parliament of Canada, in the year of our Lord one thousand eight hundred and eighty-four, by THE LAW SOCIETY OF UPPER CANADA, in the office of the Minister of Agriculture.

Chief Justices and Judges

OF THE

SUPREME COURT OF THE DOMINION OF CANADA

AND OF THE

SUPERIOR COURTS OF THE PROVINCE OF ONTARIO.

SUPREME COURT AND EXCHEQUER COURT.

CHIEF JUSTICE.

HON. SIR WILLIAM JOHNSTONE RITCHIE,
KNT, Appointed 11th of January, 1879.

JUDGES.

HON. SAMUEL HENRY STRONG..... Appointed 8th of October, 1875.
HON. TÉLÉSPHORE FOURNIER “ 8th of October, 1875.
HON. WILLIAM ALEXANDER HENRY “ 8th of October, 1875.
HON. HENRI ELZÉAR TASCHEREAU..... “ 7th of October, 1878.
HON. JOHN WELLINGTON GWYNNE..... “ 14th of January, 1879.

COURT OF APPEAL FOR ONTARIO (a).

CHIEF JUSTICES (b).

HON. THOMAS MOSS Appointed 30th of November, 1877.
HON. JOHN GODFREY SPRAGGE “ 2nd of May, 1881.

JUDGES.

HON. GEORGE WILLIAM BURTON..... Appointed 30th of May, 1874.
HON. CHRISTOPHER SALMON PATTERSON... “ 6th of June, 1874.
HON. JOSEPH CURRAN MORRISON “ 30th of November, 1877.

(a) The Court of Appeal, the Court of Queen's Bench, the Court of Chancery, and the Court of Common Pleas are, by 44 Vict. c. 5, s. 3, constituted one Supreme Court of Judicature for Ontario.

(b) The Chief Justice of Appeal is styled “Chief Justice of Ontario.”—44 Vict. c. 5, s. 4.

CHIEF JUSTICES AND JUDGES OF THE PROVINCE OF ONTARIO.

COURT OF QUEEN'S BENCH (a),
And Queen's Bench Division of the High Court of Justice.

CHIEF JUSTICE.

HON. JOHN HAWKINS HAGARTY..... Appointed 13th of November, 1878.

JUDGES.

HON. JOHN DOUGLAS ARMOUR Appointed 30th of November, 1877.

HON. MATTHEW CROOKS CAMERON " 15th of November, 1878.

COURT OF COMMON PLEAS,
And Common Pleas Division of the High Court of Justice.

CHIEF JUSTICE.

HON. ADAM WILSON (b) Appointed 13th of November, 1878.

JUDGES.

HON. THOMAS GALT Appointed 7th of June, 1869.

HON. FEATHERSTON OSLER " 5th of March, 1879.

COURT OF CHANCERY,
And Chancery Division of the High Court of Justice.

CHANCELLORS.

HON. JOHN GODFREY SPRAGGE Appointed 27th of December, 1869.

HON. JOHN ALEXANDER BOYD " 3rd of May, 1881.

VICE-CHANCELLORS.

HON. SAMUEL HUME BLAKE Appointed 2nd of December, 1872.

HON. WILLIAM PROUDFOOT..... " 30th of May, 1874.

HON. THOMAS FERGUSON " 24th of May, 1881.

MARITIME COURT.

JUDGES.

KENNETH MCKENZIE, Q. C..... Appointed 12th of July, 1877.

JOHN BOYD " 28th of March, 1883.

(a) The Courts of Queen's Bench, Chancery, and Common Pleas constitute the High Court of Justice for Ontario.—44 Vict. c. 5, s. 3, sub-s. 2.

(b) The Hon. Chief Justice Wilson was first appointed a Puisne Judge of the Court of Queen's Bench on 11th of May, 1863. The date of this appointment is omitted in R. & J. Dig., vol. i.

Masters and Referees.

ROBERT GLADSTONE DALTON, Q. C. (a) ...	Appointed Clerk of the Crown and Pleas of the Court of Queen's Bench, 21st of February, 1870; appointed Master-in-Chambers, 23rd of August, 1881.
THOMAS WARDLAW TAYLOR, Q. C.	Appointed Master-in-Ordinary, 16th of December, 1872.
RICHARD PORTER STEPHENS	Appointed Referee-in-Chambers, 1st of April, 1876.
THOMAS HODGINS, Q. C. (b)	Appointed Master-in-Ordinary of the Supreme Court of Judicature for Ontario, 10th of January, 1883.
JOHN WINCHESTER	Appointed Registrar of the Queen's Bench Division 28th of October, 1882, and Official Referee of the High Court, 22nd of March, 1884.

Ministers of Justice and Attorneys-General.

DOMINION OF CANADA.

HON. JAMES McDONALD	Appointed 17th of October, 1878.
HON. SIR ALEXANDER CAMPBELL, K.C.M.G.	" 20th of May, 1881.

ATTORNEY-GENERAL FOR ONTARIO.

HON. OLIVER MOWAT	Appointed 31st of October, 1872.
-------------------------	----------------------------------

(a) The Master-in-Chambers is an officer of the Supreme Court of Judicature for Ontario.--
44 Vict. c. 5, Rule 420.

(b) The Master-in-Ordinary is an officer of the Supreme Court of Judicature for Ontario.—
44 Vict. c. 5, s. 58, sub-s. 2.

Editor and Reporters

OF THE

SUPREME COURT OF THE DOMINION OF CANADA

AND OF THE

SUPERIOR COURTS OF THE PROVINCE OF ONTARIO.

EDITOR OF THE ONTARIO REPORTS.

CHRISTOPHER ROBINSON, Q. C. Appointed 30th of May, 1872.

REPORTERS.

SUPREME COURT OF CANADA.

ROBERT CASSELS, JR. Appointed Registrar 8th of October, 1875.

GEORGE DUVAL " 19th of January, 1876. Vols.
3 to 7, S. C. R.

COURT OF APPEAL.

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ALEXANDER GRANT Appointed 11th of February, 1882. Vols.
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27 to 29, Chy.

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1, O. R., Chy. D.

AUGUSTUS HENRY FRASER LEFROY..... " 20th of May, 1882. Vols. 1
to 4, O. R., Chy. D.

GEORGE ANTHONY BOOMER..... " 8th of December, 1883. Vol.
4, O. R., Chy. D.

PRACTICE REPORTS.

WILLIAM EGERTON PERDUE Appointed 1st of March, 1879. Vol. 8, P. R.

THOMAS TAYLOR ROLPH (a)..... " 1st of March, 1879. Vols 8 and
9, P. R.

(a) Mr. Perdue resigned 15th of October, 1882, and Mr. Rolph was appointed Practice Reporter.

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ABBREVIATIONS.

A. J. Act.	Administration of Justice Act
App. Cas..	Appeal Cases, House of Lords and Privy Council.
A. R.	Appeal Reports.
C. P..	Common Pleas Reports.
C. P. D.	Common Pleas Division.
C. L. J.....	Canada Law Journal.
C. S. C.	Consolidated Statutes of Canada.
C. S. U. C.	Consolidated Statutes of Upper Canada.
Chy.....	Chancery Reports.
Chy. D.....	Chancery Division.
D. or Dom.	Dominion of Canada.
G. O.....	General Orders of the Court of Chancery.
H. E. C.	Hodgins' Election Cases.
Imp.....	Imperial Statutes.
O. or Ont.	Province of Ontario.
O. R.	Ontario Reports.
P. R.	Practice Reports.
Q. B.	Queen's Bench Reports.
Q. B. D.	Queen's Bench Division.
R. & J. Dig.	Robinson & Joseph's Digest.
R. G.	Rules of Court.
R. S. O. ...	Revised Statutes of Ontario.
S. C... ..	Same Case.
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265	—after 5th line add, See <i>Wood v. Hurl</i> , 28 Chy. 146, p. 745.				
273—18	lines from top,	for	739	read	639.
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H. L. M.

10/27/31

DIGEST

OF

THE REPORTED CASES

IN

THE SUPERIOR COURTS OF ONTARIO,

AND

THE SUPREME COURT OF CANADA,

CONTAINED IN VOLUMES

45-46 QUEEN'S BENCH.	27-29 CHANCERY.	1-4 ONTARIO REPORTS.
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ABANDONMENT.

- I. OF EXECUTION—*See* EXECUTION.
- II. OF SHIPS—*See* INSURANCE.

ABATEMENT.

- I. PLEAS IN—*See* PLEADING.
- II. OF SUITS—*See* PRACTICE.
- III. OF PURCHASE MONEY ON SALE OF LAND—
See SALE OF LAND BY ORDER OF THE COURT—SPECIFIC PERFORMANCE.

ABSCONDING DEBTOR.

- I. ATTACHMENT, 1.
- II. SERVICE ON—*See* PRACTICE.

I. ATTACHMENT.

The affidavits upon which the order for a writ of attachment against an absconding debtor was issued were not styled in any court, although sworn before a commissioner for taking affidavits in the Q. B., who appended to his signature the words, "A Com. in B. R.," &c. :—Held, that the affidavits were sufficient. *Ellerby v. Walton*, 2 P. R. 147, followed : *Hart v. Ruttan*, 23 C. P. 613, not followed. *Scott v. Mitchell*, 8 P. R. 518. —Armour.

If a creditor has reasonable grounds for inferring his debtor's intention to defraud his creditors, a writ of attachment will not be set aside. *Ib.*

In an action at the suit of the Crown, an order was made for a writ of attachment against defendant as an absconding debtor. Service of the writ was accepted by his attorney, who entered an appearance to the writ :—Held, that this was a useless proceeding, and that the defendant should have put in special bail. *Regina v. Stewart*, 8 P. R. 297.—Osler.

Held, that the affidavit of debt, which in this case was made by the County Crown attorney, was sufficient. *Ib.*

Held, that the forfeiture of a recognizance to appear was a debt sufficient to support the application for an attachment under the Absconding Debtors' Act, and that such writ may be granted at the suit of the Crown, where the defendant absconds to avoid being arrested for a felony. *Ib.*

Held, that the amount for which special bail is to be put in need not be mentioned in the order for the writ. *Ib.*

On an application to set aside the writ :—Held, that any defect in the materials on which it was granted, might be supplied by the affidavits used on such application. Held, also, that defendant was precluded by having accepted service of the writ, with knowledge of certain alleged irregularities, and delayed moving until after the time for pleading had expired. *Ib.*

Held, that the object of sec. 20 of the Absconding Debtors' Act is to save harmless the bona fide attaching creditor, whose writ has had the effect of saving and protecting the debtor's property for the execution creditor. In this case there was a fund, not exigible under the execution, to which the attaching creditors alone were entitled, and several attachments, of which the

plaintiff's was third in time, and the whole property had been seized and sold or retained under the first writ. The plaintiff, without disclosing these facts, obtained an order under the above sec. 20, that all costs of his attachment should be paid out of the debtor's assets before the execution, and under it taxed his whole costs of suit. The order was set aside, for had the facts been disclosed it should not have been made, and in any event only the costs of suing out and executing the attachment were taxable. The application to set aside such order was held not to be an appeal. *Hughes v. Field*, 9 P. R. 127.—Osler.

ABSTRACT OF TITLE.

See QUIETING TITLES—REGISTRY LAWS.

ACCESSORY.

An accessory before the fact is liable to extradition, but an accessory after the fact is not. *Regina v. Browne*, 6 A. R. 386; 31 C. P. 484.

ACCIDENT.

I. NEGLIGENCE—*See* NEGLIGENCE.

II. INSURANCE AGAINST—*See* INSURANCE.

ACCOMPLICE.

See ACCESSORY.

ACCORD AND SATISFACTION.

See GUARANTEE AND INDEMNITY—MORTGAGE.

Held, that the evidence in this case was not sufficient to establish an allegation of accord and satisfaction. *See Weldon v. Vaughan et al.*, 5 S. C. R. 35.

ACCOUNT.

I. ACCOUNTS BEFORE THE MASTER.

1. *Generally*—*See* PRACTICE.

2. *Mortgage Suits*—*See* MORTGAGE.

II. EXECUTORS AND ADMINISTRATORS' ACCOUNTS—*See* EXECUTORS AND ADMINISTRATORS.

Right of agent to an account of the transactions of the principal and an inspection of books, notwithstanding R. S. O. c. 132, s. 3. *See Rogers v. Ullmann*, 27 Chy, 137.

Alteration of accounts—Criminal liability. *See In re Hall*, 9 P. R. 373; 8 A. R. 31.

ACCRETION,

See WATER AND WATER COURSES.

ACKNOWLEDGMENT OF TITLE.

See LIMITATION OF ACTIONS AND SUITS.

ACQUIESCENCE.

See ESTOPPEL.

Of husband in disposal of wife's earnings. *See Carroll v. Fitzgerald*, 6 A. R. 93.

Of infant in contract made during minority. *See Foley v. Canada Permanent Loan & Savings Co.*, 4 O. R., 38.

Of Corporations. *See Lett v. St. Lawrence & Ottawa R. W. Co.*, 1 O. R. 545; *Corporation of the Township of Pembroke v. Canada Central R. W. Co.*, 3 O. R. 503.

ACT OF PARLIAMENT.

See CONSTITUTIONAL LAW—STATUTES.

ACTION AND SUIT.

I. NOTICE OF ACTION, 4.

II. CAUSE OF ACTION, 5.

III. MISCELLANEOUS CASES, 5.

IV. BY AND AGAINST PARTICULAR PERSONS.

1. *By Assignee of Chose in Action*—*See* CHOSE IN ACTION.

2. *By and against other Persons*—*See* THE SEVERAL TITLES.

V. INJUNCTION TO RESTRAIN—*See* INJUNCTION.

VI. RELEASE OF—*See* RELEASE.

I. NOTICE OF ACTION.

Sec. 231 of the Division Courts Act, R. S. O. c. 47, enacts that any action or prosecution against any person for any thing done in pursuance of the Act shall be commenced within six months after the fact was committed, &c., and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action:—Held, that personal advice was not required, but that service on the wife at the defendant's residence was sufficient. *Hanns v. Johnston*, 3 O. R., C. P. D. 100.

Held, that the court in which the action is to be brought need not be stated in the notice; but even if required, *Semble*, that the statement in the notice that the action would be brought in the

High Court of Justice, without naming the particular division, was sufficient. *Ib.*

Held, that in computing the time in which the action must be brought the day on which the fact was committed must be excluded, so that an action commenced on the 5th June, for an act committed on the 5th December, was in time. *Ib.*

To registrars. See *Ontario Industrial Loan and Investment Co. v. Lindsey et al.*, 3 O. R. 66.

II. CAUSE OF ACTION.

As to place where cause of action arose on breach of contract. See *Gildersleeve v. McDougall*, 31 C. P. 164; 6 A. R. 553.

See *Caswell v. Murray et al.*, 9 P. R. 192.

III. MISCELLANEOUS CASES.

A mortgagee proceeded on the same day to foreclose the property of the mortgagor and his sureties, by several bills upon their respective mortgages, and to sue at law in different actions the same parties on notes held by the plaintiffs, to which the mortgages were collateral:—Held, that only one suit in equity was necessary, as all parties might have been brought before the Court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits; and the court would not be deterred from granting relief by the circumstance of a decree being complicated. *Merchants' Bank v. Sparkes*, 28 Chy. 108.

Quære, whether the clerk of a municipality is only liable to a conviction under sec. 189 of the Assessment Act (R. S. O. c. 180) at the suit or upon complaint of the crown, or to a civil action by the plaintiffs as well. *Corporation of the Town of Peterborough v. Edwards*, 31 C. P. 231.

One M., and the defendants as his sureties, executed a bond conditioned for the good behaviour of M., a clerk of the plaintiffs at Montreal. The bond was executed at Hamilton by the defendants who were resident there. M. made default at Montreal and absconded. Proceedings were taken against the sureties without joining M. Per Spragge, C. Though the breach occurred in Montreal, and there was no cause of action till default, yet there was a potential equity in the defendants, coeval with the execution of the bond, which became a right of suit on the default of M.: and there was also an implied contract on the part of M., upon execution of the bond, to repay to his sureties any money that they might have to pay by reason of his default. *Exchange Bank v. Springer; The same Plaintiffs v. Barnes*, 29 Chy. 270.

The contract in this case having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name: *Taschereau and Gwynne, JJ.*, diss. *Weldon v. Vaughan et al.*, 5 S. C. R. 35.

Members of charitable and provident societies should not be allowed to litigate their grievances within the society in courts of law until they have exhausted every possible means of redress afforded by the internal regulations of their societies. *Essery v. Court Pride of the Dominion*, 2 O. R., Chy. D. 596.

Therefore, where the plaintiff being expelled from the Ancient Order of Foresters, filed his bill for restitution thereto on the ground of illegal expulsion, but it appeared that the rules of the society provided certain internal tribunals to which he might have appealed for redress, but had not, this court refused to interfere. *Ib.*

It is within the power of a solicitor to settle a suit on behalf of his client, where the settlement is in good faith. *McDonald v. Field*, 9 P. R. 220—*Dalton, Master*. But this case was overruled by the Divisional Court of C. P., not reported.

The action was brought by one F. and his wife, against Archibald F., to recover nine years' arrears, under an annuity deed made by the defendant to secure \$120 a year to the plaintiffs during their lives. Janet F., the defendant's wife, had joined in the annuity deed to bar her dower. Subsequently the defendant Archibald F., abandoned his wife and absconded. Janet F., then brought an action for alimony, and now applied to be let in to defend this action, on the ground that it was collusively brought for the purpose of defeating her suit for alimony, and to deprive her of her dower in the lands:—Held, upholding the order of the Master in Chambers, that Janet F., was entitled to be admitted to defend.—*Ferris et ux. v. Ferris*, 9 P. R. 443.—*Dalton, Master*—*Ferguson*.

Action for the removal of a registered instrument wrongfully registered and for damages. See *Ontario Industrial Loan and Investment Co. v. Lindsey et al.*, 3 O. R., Q. B. D. 66.

A creditor's assignee, not himself a creditor, cannot sustain an action to set aside a fraudulent conveyance or transfer made by the debtor, prior to the assignment under which he claims to be such assignee.—*Lumsden v. Scott*, 4 O. R., Chy. D. 323.

If a person borrow money from an innocent lender and employs it in preferring a creditor, the lender is not debarred from suing for repayment. See *Court v. Holland, et al.*, 4 O. R. Chy. D. 688.

ADDING PARTIES.

See PLEADING.

ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS.

See EVIDENCE.

ADULTERY.

Particulars ordered of general charges of adultery in the statement of claim in an alimony suit. See *Rosenstadt v. Rosenstadt*, 9 P. R. 311.—Boyd.

ADVERTISEMENT.

PUBLICATION OF MUNICIPAL BY-LAW—See MUNICIPAL CORPORATIONS.

The fact that an intestate whose estate is being partitioned, has been dead for 45 years does not warrant a master in dispensing with the usual advertisement for creditors. *Biggar v. Biggar*, 8 P. R. 488.—Blake.

Notice for a call on stock under 12 Vict. c. 157 s. 27, published in a newspaper in one district is sufficient to render the shareholders residing in that district liable to pay the call, notwithstanding that the notice may not have been published in other districts where stock is held. *Provincial Ins. Co. v. Cameron, Excutrix*; and *Six other Cases*, 31 C. P. 523; affirmed 9 A. R. 56.

AFFIDAVIT.

An affidavit entitled in the Q. B., and sworn before the Judicature Act came into force, might under sec. 11, sub-secs. 2 and 3, be made the foundation of an order in the Q. B. Division. *Elliot v. Capell*, 9 P. R. 35.—Dalton, Master.—Osler.

Where the affidavit for an order to arrest, was intitled in the High Court of Justice but not in the proper Division:—Held, that the objection was clearly amendable. *Robertson v. Coulton*, 9 P. R. 16.—Osler.

The affidavits upon which the order for a writ of attachment against an absconding debtor was issued, were not styled in any court, although sworn before a commissioner for taking affidavits in the Q. B., who appended to his signature the words, "A Com. in B. R., &c."—Held, that the affidavits were sufficient: *Ellerby v. Walton*, 2 P. R. 147, followed; *Hart v. Ruttan*, 23 C. P. 613, not followed. *Scott v. Mitchell*, 8 P. R. 518.—Armour.

The affidavit of bona fides in a chattel mortgage purported to be sworn before "T. B. F." without any addition. The affidavit of execution was sworn before the same commissioner, his name being followed by the words, "A Commissioner in B. R., &c."—Held, no objection to the affidavit of bona fides. *Hamilton v. Harrison*, 46 Q. B. 127.

Where affidavits used on a motion were badly written, scarcely legible and difficult to decipher, the court refused the plaintiff all costs connected

with their preparation, although the costs of the suit were given him. *Burnham v. Garvey*, 27 Chy. 80.

In the plaintiff's affidavit on a motion to sign final judgment under Rule 80, O. J. Act, the word "defence" had been struck out, and the word "appearance" interlined, without being initialed by the commissioner before whom the affidavit was sworn:—Held, under rule 468 O. J. Act, that the affidavit could not be read. *Boyd v. McNutt*, 9 P. R. 493.—Dalton, Master.

AGENT.

I. GENERALLY—See PRINCIPAL AND AGENT.

II. OF ATTORNEY—See ATTORNEY AND SOLICITOR.

AGREEMENT.

See CONTRACT.

ALIEN.

I. SERVICE ON—See PRACTICE.

II. RIGHT TO VOTE—See PARLIAMENT.

Certain aliens had taken the oaths of allegiance, &c., before a justice of the peace of a town, which oaths were administered to them in a township, but within the same county:—Held, that under the Alien Act. 34 Vict. c. 22, s. 2, Dom., the justice of the peace in administering the oaths, was acting ministerially and not judicially; and that the oaths were properly administered. *John Johnson's Vote—Lincoln Election*, *Pauling v. Rykert*, 1 H. E. C. 500.

See *Butler et al. v. Rosenfeldt*; *Swetzer et al. v. Rosenfeldt*, 8 P. R. 175; *Smith v. Smith*, 9 P. R. 511.

ALIMONY.

See HUSBAND AND WIFE.

ALLUVION.

See WATER AND WATER COURSES.

ALTERATION.

I. OF BILLS AND NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

II. OF DEEDS—See DEED.

Alteration of accounts. Criminal liability. See *In re Hall*, 9 P. R. 373; 8 A. R. 31.

AMENDMENT.

- I. OF PLEADINGS—*See* PLEADING.
- II. PRACTICE—*See* PRACTICE.
- III. OF PETITION AND PARTICULARS IN TRIALS OF CONTOVERTED ELECTIONS—*See* PARLIAMENT.

Where pending the investigation of the title under the Quieting Titles Act, the petitioner laid out the land in village lots and registered a plan :—Held, that the petition must be amended in accordance with the plan. *Re Morse*, 8 P. R. 475.—Blake.

Amendment of sentence in a conviction by the General Sessions of the Peace. Effect of. *See McLellan v. McKinnon*, 1 O. R., Q. B. D. 219.

There having been a misnomer in the names of the applicants for a mandamus per Armour and Cameron, JJ., such misnomer not having been objected to on the argument below might be amended. Per Hagarty, C.J., in such a case no amendment should be granted as a matter of discretion. *In re High School Board of High School District No. 4, of the U. C. of Stormont, Dundas, and Glengarry, and the Municipal Corporation of the Township of Winchester; and another Case*, 45 Q. B. 460.

Held, that an information which includes three distinct offences of keeping for sale, selling, and bartering intoxicating liquors, which are prohibited by sec. 99 of the Canada Temperance Act, 1878, contravenes 32-33 Vict. c. 31, s. 25, which provides that every information shall be for one offence only, but held that such information may be amended by striking out all the offences charged except one; and that such an amendment may be made after the case has been closed and reserved for decision. *Regina v. Bennett*, 1 O. R., Q. B. D. 445.

When a bridge was wrongly described in an indictment as being in two townships:—Held, that though this could have been amended at the trial it could not be amended on a motion to set aside the verdict or for a new trial. *Regina v. The Corporation of the County of Carleton*, 1 O. R., Q. B. D. 277.

Where the affidavit for an order for arrest was intituled in the High Court of Justice, but not in the proper Division:—Held, that the objection was clearly amendable. *Robertson v. Coulton*, 9 P. R. 16.—Osler.

The capias issued after action was in the form formerly used for the commencement of an action:—Held, amendable. *Ib*.

Power of superior court judge to amend a conviction. *See Regina v. Albright*, 9 P. R. 25.—Osler.

Of an information for violation of the Canada Temperance Act 1878. *See Regina v. Bennett*, 3 O. R., Q. B. Div. 45.

ANCIENT DOCUMENTS.

See EVIDENCE.

ANIMALS.

- I. IMPOUNDING AND KEEPING—*See* MUNICIPAL CORPORATIONS.
- II. INJURY TO—*See* RAILWAYS AND RAILWAY COMPANIES.

ANNUITY.

See WILL.

On the 18th October, 1866, the owner of real estate granted an annuity thereof of \$40, with power of distress in case of default. Only one year's annuity was paid, and in October, 1877, the grantor, by writing, acknowledged the amount then due. On a bill filed by the annuitant claiming ten years' arrears, with interest thereon:—Held, that the power of distress was not such a penalty as took the case out of the general rule that interest will not be allowed on arrears of annuity; and that notwithstanding the written admission by the grantor of the amount due under the deed, the annuitant could recover only six years' arrears without interest, as against a *paise* incumbrancer who had duly registered his conveyance. *Crone v. Crone*, 27 Chy. 425.

ANSWER.

See PLEADING.

ANTE-NUPTIAL SETTLEMENT.

See FRAUDULENT CONVEYANCES.

APPEAL.

- I. TO PRIVY COUNCIL—*See* PRIVY COUNCIL.
- II. TO SUPREME COURT—*See* SUPREME COURT.
- III. TO COURT OF APPEAL—*See* COURT OF APPEAL.
- IV. TO DIVISIONAL COURT—*See* DIVISIONAL COURT.
- V. FROM COUNTY COURTS—*See* COUNTY COURTS.
- VI. FROM DIVISION COURTS—*See* DIVISION COURTS.
- VII. FROM JUDGE IN SINGLE COURT—*See* DIVISIONAL COURT.
- VIII. FROM CLERK OF THE CROWN AND PLEAS—*See* PRACTICE.
- IX. FROM MASTER IN CHAMBERS AND MASTER IN ORDINARY—*See* PRACTICE.
- X. FROM REFEREE—*See* PRACTICE.
- XI. FROM MAGISTRATES—*See* SESSIONS.
- XII. FROM AWARDS—*See* ARBITRATION AND AWARD.

XIII. FROM ASSESSMENT—See ASSESSMENT AND TAXES.

XIV. IN APPLICATIONS FOR NEW TRIAL—See NEW TRIAL.

XV. IN TRIAL OF CONTROVERTED ELECTIONS—See PARLIAMENT.

XVI. PAYMENT OF MONEY OUT OF COURT PENDING APPEAL—See COSTS.

Recovery back of money paid into court as security for appeal—Interest. See *The Citizens' Ins. Co. v. Parsons*, 32 C. P. 492.

Quære, can the Dominion Parliament give an appeal in a case in which the Legislature of a Province has expressly denied it. *Danjou v. Marquis*, 3 S. C. R. 251.

In penal statutes questions of doubt are to be construed favourably to the accused, and where the court of first instance in a quasi criminal trial has acquitted the respondent the appellate court will not reverse the finding. *North Ontario Election—McCaskill v. Paxton*, 1 H. E. C. 304.

An appellate court will not, except under special circumstances, interfere with the finding of the court of first instance on questions of fact depending on the veracity of witnesses and conflicting evidence. *Halton Election—Russell v. Barber*, 1 H. E. C. 283.

Per Gwynne, J. A court of appeal should not reverse the finding upon matters of fact of the judge who tried the cause and had the opportunity of observing the demeanour of the witnesses, unless the evidence be of such a character as to convey to the mind of the judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous. *Ryan v. Ryan*, 5 S. C. R. 406. See also, *Little v. Brunker*, 28 Chy. 191; *The Picton—McQuaig et al. v. Keith*, 4 S. C. R. 648.

Per Gwynne, J. It is a point fairly open to enquiry in a court of appeal whether or not, as in this case, the inferences drawn from the evidence by the judge who tried the case without a jury, were the reasonable and proper inferences to be drawn from the facts. *Gallagher v. Taylor*, 5 S. C. R. 368.

In an action of damages, if the amount awarded in the court of first instance is not such as to shock the sense of justice and to make it apparent that there was error or partiality on the part of the judge (the exercise of a discretion on his part being in the nature of the case required) an appellate court will not interfere with the discretion such judge has exercised in determining the amount of damages. *Levi v. Reed*, 6 S. C. R. 482.

The court being equally divided, the judgment of the court below was not altered. *McLeod v. The New Brunswick Railway Co.*, 5 S. C. R. 281. See also, *Moore v. The Connecticut Mutual Life Assurance Co. of Hartford*, 6 S. C. R. 634; *Côté v. Morgan*, 7 S. C. R. 1; *McCallum v. Odette*, 1b. 36; *Murray et al. v. The Canada Central R. W. Co.*, 7 A. R. 646; *In re Hall*, 8 A. R. 135;

The Canada Central R. W. Co. v. McLoren, 8 A. R. 564.

The plaintiff was permitted to proceed with a new trial pending an appeal where he shewed that he had already been inconvenienced by delay, that further delay would prejudice him financially, and that by it he might lose important oral evidence. *McDonald v. Murray et al.*, 9 P. R. 464.—*Winchester, Registrar Q. B. D.—Hagarty*.

An interim injunction will not be granted in aid of a plaintiff, to preserve the subject matter of his action in statu quo long enough to enable him to obtain the decision of an appellate court on points already decided in other cases, against his contention, in courts of first instance. *Wylde v. McMaster*, 4 O. R., Chy. D. 717.

As to separate appeals to different courts. See *Hately et al. v. Merchants' Despatch Co. et al.*, 4 O. R., Q. B. D. 723.

APPOINTMENT.

POWER OF—See WILL.

APPROPRIATION OF PAYMENTS.

See PAYMENT.

ARBITRATION AND AWARD.

I. SUBMISSION OR REFERENCE.

1. *What may be referred*, 13.
2. *Reference under C. L. P. Act, and O. J. Act*, 13.
3. *Making Submission a Rule of Court*, 14.
4. *Restraining Arbitrators from proceeding*, 14.

II. ARBITRATOR.

1. *Power and Duty of.*
 - (a) *Directing time and manner of Payment*, 15.
 - (b) *Costs*, 16.

III. UMPIRE OR THIRD ARBITRATOR, 16.

IV. EXAMINATION OF WITNESSES, 17.

V. AWARD.

1. *Time of making*, 17.
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VI. STAYING AND SETTING ASIDE PROCEEDINGS ON AWARD.

1. *Misconduct of Arbitrators*, 19.
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IX. IN PARTICULAR CASES.

1. *Arbitration of questions arising between members of Incorporated Societies*, 20.

2. *Reference of loss under Insurance Policies*—See INSURANCE.
3. *Under The Municipal Act*—See MUNICIPAL CORPORATIONS.
4. *Under Railway Acts*—See RAILWAYS AND RAILWAY COMPANIES.

I. SUBMISSION OR REFERENCE.

1. What may be referred.

Reference directed to determine the amount of damages sustained by the plaintiff under an agreement to serve defendant, as manager of a tannery, for six years, the agreement reciting that plaintiff was to manage the works and the defendant was to furnish the capital, for failure of the defendant to perform his part of the agreement, and for the dismissal of the plaintiff. *Blake v. Kirkpatrick*, 6 A. R. 212.

2. Reference under C. L. P. Act and O. J. Act.

Quære, whether a reference by consent by rule of court or judge's order is within sec. 205 of the C. L. P. Act. *McCarthy v. Arbuckle*, 31 C. P. 405.

Held, on an application to refer to arbitration an action on the common counts, that where a material question of fact was in dispute, the case was not a proper one in which to make an order for compulsory reference. *Gannon v. Gibb*, 8 P. R. 115.—*Dalton, Q.C.*

An action for an account and delivery up of a trust estate was referred at the trial to the master at Picton, by an order drawn up on reading the pleadings and hearing counsel; the master to have all the powers of a judge as to certifying and amending pleadings, &c., and to enquire and report as to the plaintiff's right to bring an action, the defendant to have the right to claim all such allowances for his care, &c., as in the master's opinion he should shew himself entitled to: costs to be in the master's discretion, and the whole report to be reviewed or appealed from, according to the statute in that behalf:—Held, a reference under sec. 189 of the C. L. P. Act (not under sec. 47, or 48 of the Judicature Act), and that an appeal from the finding of the master was therefore set regularly down under the provisions of that Act to be heard before a single judge in court. *Cumming v. Low*, 2 O. R. 499.—*Osler.*

Remarks as to the effect and application of secs. 47 and 48, above referred to, and as to the proper form of the order of reference. *Id.*

At the trial the following order of reference was made: "Upon hearing the solicitors on both sides, and by their consent, I order that all matters in difference between the parties in this cause be referred to the certificate of the local master of this court at Orangeville, with all the powers as to certifying and amending of a judge of the High Court of Justice, and that the costs of the suit and of the reference be in the discretion of the said local master"—Held, that the master was to act as an arbitrator under the C. L. P. Act, not as an officer of the court under

secs. 47, 48 of the O. J. Act, and that defendant might sign judgment on his report. *Wallace v. Whaley*, 9 P. R. 248.—*Dalton, Master.*

3. Making Submission a Rule of Court.

By an agreement made between L., a builder, and the building committee of a religious body, all previous contracts and agreements were terminated and surrendered, and L. was to forego all right to compensation except under the agreement. One E. was to inspect and value the work already done on the building, and if not according to plans and specifications, L. was to rectify the same at his own expense. E. was to value the building in its present condition, and his award was to be final, and to be the sole amount due to L. to date; he was also to inspect and value the building material on the ground, which was to be paid for at the original cost:—Held, that the effect of the agreement was, that a price to be fixed by E. was to be paid for L.'s works, that E. was not an arbitrator; and that the agreement could not be made a rule of court as a submission to arbitration. *In re Langman and Martin et al.*, 46 Q. B. 569.

When a submission to arbitration provides for making the submission a rule of any particular court, no suit or proceeding can be had in any other court to set aside the award, whether such submission has or has not been made a rule of the court named in it. *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Chy. 648.

The plaintiff and defendant agreed in writing to submit certain matters in dispute to an arbitrator, to be selected by a person named in the submission, who subsequently appointed the arbitrator verhally:—Held, per Patterson and Morrison, JJ. A., affirming the judgment of Osler, J., 30 C. P. 466, that the fact that the arbitrator was verbally appointed did not prevent the submission from being made a rule of court. Per Burton, J. A., and Armour, J., that the appointment not being in writing, it was a parol submission and could not be made a rule of court. *Cruickshank v. Corbey*, 5 A. R. 415.

The agreement for submission contained a clause that it should be made a rule of the Court of Queen's Bench in England, and all proceedings thereunder should be governed as in Great Britain by the provisions of the English C. L. P. Act:—Held, that this formed no objection to the jurisdiction of our Court of Chancery. *The Direct United States Cable Co. (Limited) v. The Dominion Telegraph Co. of Canada*, 8 A. R. 416; 28 Chy. 648.

4. Restraining Arbitrators from Proceeding.

Before a submission has been made a rule of court, a court of equity has jurisdiction to restrain an arbitrator improperly appointed from entering upon the duties of such arbitration. *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Chy. 648.

In a suit in the Court of Chancery to set aside the nomination by the defendants of an arbitrator on behalf of the plaintiffs for irregularity in such nomination:—Held, that the arbitrators being necessary parties and the defendants resident in

this country, the arbitrators, though resident out of the jurisdiction, were properly made defendants to the bill. *Ib.*

The object of a cross bill ordinarily was to obtain discovery on the part of the plaintiff in the cross cause to be used in the original cause; or in order to obtain full relief in respect of the subject matter of litigation in the original cause. Therefore, where a bill was filed to restrain arbitrators on the ground of irregularity in their appointment, from acting in respect of matters in dispute between the plaintiff and defendant companies and the defendants by their answer asked that if the court entertained the case it should afford them relief in respect of the matters in dispute between the companies:—Held, that this was not the proper office of a cross bill, and therefore could not be set up as a subject of cross relief by the answer. *Ib.*

The defendants also set up by way of defence and as a ground of demurrer to the plaintiffs' bill to restrain proceedings by the alleged arbitrators, the pendency of another action in New York for the same purpose; but—Held, that this could only form a ground for application to stay proceedings, or to compel the plaintiffs to elect between the two tribunals; and, Semble, that under the circumstances set out in the report of the case, it could not be taken advantage of in any way. *The Direct United States Cable Co. (Limited) v. The Dominion Telegraph Co. of Canada*, 8 A. R. 416; 28 Chy. 648.

II. ARBITRATOR.

1. Power and Duty of.

(a) Directing Time and Manner of Payment.

Where the reference was only for the purpose of ascertaining and awarding the damages sustained by the plaintiff by a fire negligently set by the defendant, and the defendant agreed to pay the amount awarded; and it was provided that the costs of the arbitrators and award, &c., should be paid by the party entitled thereto, in whose favour the award should be made:—Held, that the arbitrators had no power to give a month for payment of the sum awarded, or to direct that the defendant should pay the costs, but that these directions were severable from the rest of the award, and might be rejected. In such a case the proper course is to discharge generally a rule to set aside the award, not to make it absolute in part. *Re Egleston and Taylor*, 45 Q. B. 479.

A submission to arbitration recited that a controversy existed between A. W., J. W. and M. in relation to the amounts due and paid on a certain mortgage made by M. to a loaning company, and as to the proportion of said mortgage paid by the said parties to the company, and submitted this controversy to the arbitrators; and the parties covenanted with each other to observe the award. The arbitrators awarded that M. had paid the company the amount he agreed with A. W. to pay on the mortgage, and had overpaid his proportion by \$627, in which sum A. W. was indebted to him; and that A. W. should pay that sum to him on or before the 1st of June, 1882; and should also pay the costs of the reference, viz., \$35. Nothing was said about J. W.:—

Held, by Osler, J. (1) That the arbitrators had not exceeded their powers in directing payment by A. W. (2) That the award was not bad for omitting to mention J. W., this being equivalent to an award that there was nothing due by him:—Held, that the finding as to costs was unauthorized, but was severable from the rest of the award. *Whitely et al. v. MacMahon*, 32 C. P. 453.

(b) Costs.

By an order of reference the arbitrator was empowered to certify and amend pleadings and proceedings, and otherwise as a judge *ad nisi prius*, and costs of the reference, arbitration, and award were to abide the result of the award:—Held, that the arbitrator had no power to make any disposition of the costs, as they were provided for by the reference. *Devanney et al. v. Dorr et al.*, 4 O. R., C. P. D. 206.

When the submission or order of reference is silent as to costs, arbitrators have no power to adjudicate upon them, but each party must bear his own costs and half those of the award. A direction as to the costs in such a case:—Held, severable from the rest of the award. *Re Harding and Wren*, 4 O. R., Q. B. D. 605.

[See last subhead.]

III. UMPIRE OR THIRD ARBITRATOR.

To an action for wrongful dismissal, and on the common counts, defendants pleaded an award, by which all matters in dispute between the parties had been settled. The submission was to S. and N., and such third person as "the said arbitrators" should appoint, "so that the said arbitrators or umpire" make his or their award by, &c., or such further day as "the arbitrators, or any two of them," might enlarge to. Before entering upon their duties, S. and N. appointed E. as third arbitrator, and the award was executed by S. and E. only, but professed, in the body of it, to be the award of the three:—Held, that E. was a third arbitrator, not an umpire, that the word "umpire," in the submission, must be rejected as surplusage; and the award was invalid, not having been made by all three arbitrators. *Willson v. York*, 46 Q. B. 289.

One of the stipulations in a contract between the plaintiff and defendant companies was, that if any dispute arose between them it should be referred to arbitration, each of the parties to name an arbitrator, and the two within ten days after the appointment of the one last named, should appoint an umpire; but if either party should neglect or refuse to appoint an arbitrator for the space of ten days after being requested so to do, or should appoint an arbitrator who should refuse or neglect to act as such, then the arbitrator of the party making such request should appoint an arbitrator on behalf of the other party. A notice by the defendant company requiring the plaintiff company to appoint an arbitrator was duly served on the 10th of June, on the agent of the plaintiff company in New York, and on the 19th the plaintiff company, by cablegram from London, named one C. M. D., of

New York, as their arbitrator, On the 28th of the same month S., the arbitrator of the defendant company, wrote to C. M. D. requiring him to join in the naming of an umpire, but he answered that he was about to leave the city, and would return on the 30th; that having been only advised by cable of his appointment and that his commission would be mailed to him, he could not until its arrival, intelligently take any action. On the 30th C. M. D. returned to his office, and then wrote to S. expressing his readiness to act, and at the same time confirmed a nomination made by his partners, during his absence, of an umpire:—Held, affirming the decree of the court below, 28 Chy. 648, (1) that the facts did not establish any refusal or neglect on the part of C. M. D. to act as arbitrator, such as would justify S. in naming an arbitrator in his stead: (2) that the naming by the arbitrators of an umpire was not such an act as required C. M. D. to take part in within ten days from his appointment, or in default that his appointment should be vacated, and S. have the right to name a substitute. *Direct United States Cable Co. (Limited) v. Dominion Telegraph Company of Canada*, 8 A. R. 416; 28 Chy. 648.

IV. EXAMINATION OF WITNESSES.

Held, that under R. S. O. c. 50, s. 224, the witnesses on an arbitration must be examined upon oath, unless there is a positive agreement or consent to the contrary. Such consent or agreement may be shewn deors the submission, and in this case, upon the affidavits filed, it was held to be sufficiently made out; but, semble, that it cannot be inferred from the absence of objection or mere acquiescence. *In re Rushbrook and Starr*, 46 Q. B. 73.

V. AWARD.

1. Time of making.

In an action on contract, the matters in difference were, by rule of court, by and with the consent of the parties, submitted to arbitration. By the rule of reference the award was directed to be made on or before the 1st May, 1877, or such further or ulterior day as the arbitrators might endorse from time to time on the order. The time for making the award was extended by the arbitrators till the 1st of September, 1877. On the 31st August, 1877, the attorneys for plaintiff and defendants, by consent in writing, endorsed on the rule of reference, extended the time for making the award till the 8th September. On the 7th September the arbitrators made their award in favour of the plaintiff for the sum of \$5,001.42, in full settlement of all matters in difference in the cause:—Held, reversing the judgment of the Supreme Court of Nova Scotia, that where the parties, through their respective attorneys in the action, consent to extend the time for making an award under a rule of reference, such consent does not operate as a new submission, but is an enlargement of the time under the rule and a continuation to the extended period of the authority of the arbitrators, and therefore an award made within the extended period is an award made under the rule of reference, and is valid and binding on the parties. That the fact

of one of the parties being a municipal corporation makes no difference. *Oakes v. The City of Halifax*, 4 S. C. R. 640.

2. Reference back.

In ejectment it was ordered in Hilary term, 1879, that a verdict should be entered for the plaintiff, but no execution to issue until the value of the improvements was ascertained and the amount thereof paid to the defendant, and that it be referred to the Master in Chancery at Ottawa, to ascertain such value. The master made his report on the 30th of October, 1879, merely finding the value of the improvements, without making any allowance for the rents and profits. In Easter term, 1880, the plaintiff moved to refer back the report to the master to make such allowance:—Held, reversing the decision of Galt, J., 31 C. P. 227, that the reference was to the master as an officer of the court, and that there was nothing in any of the sections of the C. L. P. Act, (R. S. O. c. 50), relating to arbitrations, which interfered with the right of the court, under the circumstances, to review the act of their officer, and to send the matter back for his reconsideration. The matter was therefore referred back to the master to make such allowance. *McCarthy v. Arbuckle*, 31 C. P. 405.

The arbitrators having made two previous awards, which had both been referred back to them, and great expense incurred, the Court refused to refer the matter back to them, but ordered that it be remitted to the judge of the County Court, unless counsel could agree upon such facts as would enable the court to deal with the matters in dispute. *In re Albemarle and Eastnor*, 46 Q. B. 183.

See *Moore v. Buckner*, 28 Chy. 606, p. 19.

3. Appeal from.

Where a voluntary submission to arbitration contained a provision that the agreement might be made a rule of court, and that the court might be moved to set aside or refer back the award:—Held, that this conferred no right of appeal under R. S. O. c. 50, s. 191, which, under sec. 205, could only be conferred by the terms of the submission. *In re Township of York and Willson*, 8 P. R. 313.—Osler.

An appeal lies from an award made in pursuance of a consent order of reference in a cause at nisi prius under sec. 205 of the C. L. P. Act. *McEwan v. McLeod*, 46 Q. B. 235.

Held, that in Nova Scotia, where the rule nisi to set aside an award specifies certain grounds of objection, and no new grounds are added by way of amendment in the court below, no other ground of objection to the award can be raised on appeal. *Oakes v. The City of Halifax*, 4 S. C. R. 640.

Quære, where the land having been taken under an Act of the Dominion Parliament whether the finding of the arbitrators could be reviewed under 38 Vict. c. 15 Ont. *Norvall v. Canada Southern R. W. Co.*, 5 A. R. 13.

VI. STAYING AND SETTING ASIDE PROCEEDINGS ON AWARD.

I. Misconduct of Arbitrators.

Held, that the award in this case was bad and must be set aside, as it appeared that the arbitrators had received the evidence of one of the parties in the absence of the others, and after the arbitration was supposed to be closed. *Whiteley et al. v. McMahon*, 32 C. P. 453.

Held, affirming the decree of Proudfoot, V. C., that the plaintiff was entitled to specific performance of an award giving him damages for his lands taken by the defendants: that the sum awarded was not so excessive as to shew any fraudulent or improper conduct on the part of the arbitrators; and, quære, whether, if shewn it would be a defence in such a proceeding. *Norvall v. Canada Southern Railway Co.*, 5 A. R. 13.

See *Harding v. The Corporation of the Township of Cardiff*, 29 Chy. 308.

2. Time for moving.

On the 2nd of December, 1878, the submission being within the 9 & 10 Will. III., the plaintiff moved to set aside an award made on the 13th of August previously, accounting for his delay on the ground that the defendant had, on the 4th of September, before the end of the next term, served a notice on him of his intention to appeal. It was not, however, sworn that he refrained from moving owing to this notice:—Held, reversing the decision of Proudfoot, V. C., that the evidence did not shew that the delay was induced by the defendant, but that even if it had, it would have been no excuse for the delay, and the motion was refused. *Pardee v. Lloyd*, 5 A. R. I.

VII. ENFORCING AWARD.

In answer to a bill to enforce an award, the defendant by answer submitted to the court a number of matters as objections to the award, and that a reference back to the arbitrator, with certain instructions, or a reference to the master as to the matters in dispute should be directed. At the hearing on bill and answer, the defendant objected (1) to the jurisdiction of the court, the submission providing that the submission and award should be made a rule of the Queen's Bench or Common Pleas; (2) that the filing of the bill was premature, the time for moving against the award not having expired:—Held, that a proceeding to enforce an award by summary application, must be taken after the time for moving against it has elapsed. *Moore v. Buckner*, 28 Chy. 606.

Quære, whether a proceeding for that purpose by action at law or suit in equity, can be taken before that time. *Ib.*

Held, also, that the objection to the jurisdiction would have prevailed if properly taken, as the parties to the submission had agreed upon their forum; but the defendant having submitted to the jurisdiction by his answer, and himself

asked the intervention of the court, could not now be heard to object. *Ib.*

See *Norvall v. Canada Southern Railway Co.*, 5 A. R. 13, p. 19.

VIII. COSTS.

It not appearing that there was any good reason for filing a bill instead of proceeding in the usual way, the court (Spragge, C.) refused to the plaintiff any costs other than such as he would have been entitled to had he proceeded to enforce the award under the statute. *Moore v. Buckner*, 28 Chy. 606.

See *Harding v. The Corporation of the Township of Cardiff*, 29 Chy. 308.

IX. IN PARTICULAR CASES.

1. Arbitration of questions arising between members of Incorporated Societies.

See *Cannon v. The Toronto Corn Exchange*, 5 A. R. 268; *Essery v. Court Pride of the Dominion*, 2 O. R. 596.

ARBITRATOR.

See ARBITRATION AND AWARD.

ARREST.

I. ON ATTACHMENT—See ATTACHMENT OF THE PERSON.

II. ON CA. RE.—See CAPIAS AD RESPONDENDUM.

III. CA. SA.—See CAPIAS AD SATISFACIENDUM.

IV. ON NE EXEAT—See NE EXEAT.

V. WRIT OF ARREST—See WRIT OF ARREST.

VI. WARRANT FOR ARREST—See WARRANT FOR ARREST.

VII. BAIL—See BAIL.

VIII. MALICIOUS ARREST—See MALICIOUS ARREST, PROSECUTION, AND OTHER PROCEEDINGS.

The general rule that it is against the policy of our law to permit a foreigner to follow another into Ontario, and arrest him for a debt contracted abroad, is limited to cases in which the debtor is here on temporary business, and is about to return to his own country. *Butler et al. v. Rosenfeldt*; *Sweetzer et al. v. Rosenfeldt*, 8 P. R. 175.—Osler.

And where the debtor has absconded from his own country to Ontario, and does not intend returning, or intends to go to some other country, the creditor may follow and arrest him here upon a ca. re. *Ib.*

On an application to set aside an arrest the judge should not enquire into the particular form

of the action, if satisfied that a cause of action exists. *Ib.*

A defendant having contracted a debt in the United States of America, his ordinary place of abode, and in the act of returning there after a visit to his parents in this country, cannot be arrested on a charge of leaving Ontario with intent to defraud his creditors. *Smith v. Smith*, 9 P. R. 511.—Hagarty.

Quære, as to the liability of a married woman to arrest. *The Metropolitan Loan and Savings Co. v. Mara et ux.*, 8 P. R. 355.—Wilson.

The prisoner was arrested in Toronto, upon information contained in a telegram from England, charging him with having committed a felony in that country, and stating that a warrant had been issued there for his arrest:—Held, that a person cannot, under the Imperial Act 6 & 7 Vict. c. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and endorsed by a judge of a superior court in this country. Such warrant must disclose a felony according to the law of this country, and Semble, that the expression "felony, to wit, larceny," is insufficient. The prisoner was therefore discharged. *Regina v. McHolme*, 8 P. R. 452.—Cameron.

Defendant was arrested and held to bail for a debt alleged by plaintiff to be \$704, but the plaintiff recovered only \$489. As to \$80 which the plaintiff failed to recover, it was held, on the facts stated in the report of the case, that he had no reasonable ground for believing defendant to be liable, and he abandoned it at the trial, but as to the other portion, for which he failed, he had reasonable ground:—Held, that defendant was entitled to tax his costs of defence against the plaintiff under R. S. O. c. 50, s. 343. *Porritt v. Fraser*, 8 P. R. 430.—Osler.

Held, that the County Court Judge's order to arrest was well proved under R. S. O. c. 62, s. 28, by the production of a copy certified as such under the hand of the clerk of the court; but that the affidavit on which the capias issued, filed in that court, was not duly proved by the production of a copy of the affidavit similarly certified and with a seal attached, apparently that of the court, but not referred to or described in the certificate. *Timmins v. Wright*, 45 Q. B. 246.

Notwithstanding the Judicature Act, sec. 90 and rule 5, a writ of capias may still be issued under R. S. O. c. 67, and the C. L. P. Act before an action has been commenced by a writ of summons. *Vetter v. Cowan*, 46 Q. B. 435.

On an application to set aside the order for an arrest and the writ, &c., but not to be discharged out of custody, objections that the affidavit discloses no sufficient cause of action, or shews that the defendant is about to leave the province are not open. *Robertson v. Coulton*, 9 P. R. 16.—Osler.

Where the affidavit for the order was entitled in the High Court of Justice, but not in the proper division:—Held, that the objection was clearly amenable. *Ib.*

The capias issued after action, was in the form formerly used for the commencement of an action:—Held, amenable. *Ib.*

The affidavit stated only that defendant was indebted in \$116.60 on two promissory notes overdue; but defendant who had left the country, did not deny that he was indebted, and the particulars were stated in the special endorsement of the writ of summons served on him. An affidavit stating the particulars sufficiently was allowed to be filed in support of the order. *Ib.*

See also, *McSorley v. The Mayor, &c., of St. John et al.*, 6 S. C. R. 531.

ARREST, WRIT OF.

See WRIT OF ARREST.

ASHBURTON TREATY.

See EXTRADITION.

ASSAULT.

CRIMINAL ASSAULT—See CRIMINAL LAW.

The plaintiff who had purchased a special excursion ticket from Toronto to Niagara and return on the same day by a steamer of the defendants, and which had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding the plaintiff's fare, and the latter refusing to pay it, the porter by the purser's direction, laid hold of a valise which the plaintiff was carrying and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured:—It appeared that the purser had been summoned by the plaintiff before a magistrate for the assault, and a fine imposed, which he paid. Per Wilson, C. J.—This under 32-33 Vict. c. 20, s. 45, Dom., though a release to the purser, did not constitute any bar to the present action against the company. *Emerson v. The Niagara Navigation Co.*, 2 O. R., C. P. D. 528.

The defendants were convicted for unlawfully assaulting F. V. "by standing in front of the horses and carriage driven by the said V., in a hostile manner, and thereby forcibly detaining him, the said V., in the public highway against his will":—Held, that the conviction was bad in stating the detention as a conclusion and not as part of the charge, which, as shewn by the conviction, was merely standing in front of the horses, and did not amount to an assault. *Regina v. McElligott et al.*, 3 O. R., Q. B. D. 535.

ASSESSMENT.

- I. OF DAMAGES—*See* DAMAGES.
- II. FOR TAXES—*See* ASSESSMENT AND TAXES.
- III. QUALIFICATION OF VOTERS.—*See* PARLIAMENT.

ASSESSMENT AND TAXES.

I. ASSESSMENT.

1. *Of Personality.*
 - (a) *Of Foreign Corporations*, 23.
 - (b) *Ships*—*See* SHIPS.
2. *Of Income*, 24.
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VII. SALE OF LAND FOR TAXES.

1. *Proof of Taxes in Arrear*, 27.
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 - (a) *By whom to be executed*, 28.
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VIII. MUNICIPAL BY-LAWS FOR DRAINAGE AND SEWERS—*See* MUNICIPAL CORPORATIONS.IX. TAXES BETWEEN VENDOR AND PURCHASER—*See* SALE OF LAND—SALE OF LAND BY ORDER OF THE COURT.

I. ASSESSMENT.

1. *Of Personality.*(a) *Of Foreign Corporations.*

The plaintiffs were a company incorporated under the Imperial Companies' Acts of 1862 and 1867, for the purpose of lending money on real estate or on public securities, &c., the registered office of which was in the city of Aberdeen, Scotland, but having an agency, and the only agency, of the company at Toronto, Ontario. All the income or profits of the company arising from the business in Ontario, after deducting expenses of management, were remitted by the general managers at Toronto to Aberdeen, where all dividends were declared, and paid to the

shareholders, who were assessed for income tax under the laws of Great Britain. By 43 Vict. c. 27, s. 1, O., the personal property of an incorporated company (other than those mentioned in sub-sec. 2, namely, banks or companies investing all or the greater part of their means in works requiring the investment of the whole or principal part of their means in real estate, and which are exempt) shall be assessed against the company in the same manner as an unincorporated company, or partnership, which, under s. 30 of R. S. O. c. 180, is assessable against the firm at the usual place of business, and not against the individual partners; and by s. 3 of the 43 Vict. c. 27, all personal property in the province, the owner of which is not resident therein, shall be assessable like that of residents, whether in the possession or control or in the hands of an agent or trustee or not, and shall be assessable in the municipality in which such property shall happen to be, but by sub-section 3 this section was not to apply to dividends or other choses in action owned and standing in the name of a person not residing in the province. The corporation of the city of Toronto under the said sec. 3, assessed the plaintiffs for \$100,000 of personal property, being the interest of moneys invested in Ontario, and paid or payable to the agents at Toronto, or at the credit of the company at a bank, or being moneys lying at the credit of the company in a bank for investment:—Held, that s. 3 of the 43 Vict. c. 27 O., was not ultra vires of the legislature, and that the assessment came within its provisions: that this was not one of the companies mentioned in sub-sec. 2 of sec. 1 of the Act, nor was the personal property dividends or other choses in action under sub-s. 3 of that section. *In re North of Scotland Canadian Mortgage Co.*, 31 C. P. 552.

See the next case.

2. *Of Income.*

The tax imposed by 31 Vict., c. 36, s. 4, N. B., upon "income," is leviable in respect of the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund which is capable of being assessed. There is nothing in the said section or in the context which should induce a construction of the word "income," when applied to the income of a commercial business for a year, otherwise than its natural and commonly-accepted sense as the balance of gain over loss. *Lawless v. Sullivan*, 6 App. Cas. 373, reversing judgment of Supreme Court, 3 S. C. R. 117.

3. *Of Lands.*

The north part of a lot, called lot I in one survey, and lot 4 in another, of 100 acres more or less, was assessed variously as "number 1, N. half," &c. "Number 1, N. part," &c. "N. half lot number 1," &c., and "broken lots I and 4." The collector's roll shewed similar discrepancies:—Held, that though these irregularities indicated want of care and accuracy in the officers of the municipality, they did not invalidate the assessment, as the land was sufficiently

pointed out. *McKay v. Cryslar*, 3 S. C. R. 436, distinguished. *Nelles v. White*, 29 Chy. 338.

See *Fleming McNabb*, 8 A. R. 656, p. 31.

See also VII. 5, p. 29.

II. APPEAL TO COURT OF REVISION AND COUNTY JUDGE.

A County Judge in appointing a day subsequent to the first of August, for hearing an appeal from a Court of Revision is not, under R. S. O. c. 180, s. 59, sub-s. 7, exceeding his jurisdiction, notwithstanding the terms of that sub-section. *In re Ronald and the Village of Brussels*, 9 P. R. 232.—Cameron.

See *Re McLean and the Corporation of the Township of Ops*, 45 Q. B. 325.

III. STATUTE LABOUR.

[See 46 Vict. c. 24, s. 2, Ont.]

There is no liability to perform statute labour in a village municipality, and a by-law providing for its commutation was held *ultra vires* and void, and was quashed. *In re Stayner et al.*, 46 Q. B. 275.

Held, that a township council can provide for the performance of statute labour upon the roads of their township to the extent of the commutation tax charged in respect of non-resident lands, and for payment thereof out of the general funds of the municipality before such tax has been received from the county treasurer; and that the performance of such work is not necessarily restricted to any particular statute labour division. *In re Allan and The Corporation of the Township of Amabel*, 32 C. P. 242.

IV. TAXES WHEN DUE.

On the 2nd April, 1880, a by-law was passed by the corporation of the city of Toronto imposing a rate for that year, and on the same day another by-law was passed providing for the time and mode of payment, declaring that all taxes over \$5 should be due on 4th June, and might be paid by three instalments, and that on prompt payment of the first instalment on the said 4th June the time would be extended for the payment of the other instalments to days named, and so with the second instalment, &c., and on non-payment an additional charge of five per cent. was imposed. It was also expressly provided that nothing therein contained should affect or diminish the collector's right, when he should deem it expedient, after a proper demand made, to proceed at any time before the said several days to collect the said taxes by distress, &c. By the statute R. S. O. c. 180, the right to distrain is given on neglect to pay in fourteen days after demand; and such demand shall be made by calling at least once at the party's residence and demanding the taxes. The statute also provided that all taxes levied for any year should be considered to be imposed and to be due from the 1st January, and end with the 31st December thereof, unless otherwise expressly pro-

vided by by-law. The tax collector, about 20th May, left with the plaintiff whose taxes were over \$5, a tax bill stating, in accordance with the above by-law, that the taxes were due on the 4th June, but that payment could be made by instalments, &c.; and that by want of punctuality the party would not only forfeit such right but render his goods liable to distress on neglect to pay fourteen days after demand. After the 4th June the plaintiff, not having paid any of the taxes, the tax collector, without any further demand, issued his warrant to his bailiff who distrained the plaintiff's goods on the 12th June, and sold them on the 18th June:—Held, that the taxes were not due until the 4th June, and that no demand could be made until that date, and therefore the leaving a tax bill before that date, even if otherwise a demand, could not be deemed to be such; and, *Quære*, whether the mere leaving of such tax bill, even if after the 4th June, could be deemed to be a demand. *Chamberlain v. Turner et al.*, 31 C. P. 460.

Held, also, that the insertion in the by-law of the discretionary power to the collector to distrain was improper and unauthorized. *Id.*

Semble, that the rate and the time and mode of payment should more properly have been contained in the same by-law instead of separate ones as here, but as they were passed on the same day, even if an application to quash the latter by-law on this ground had been made, it would not be deemed invalid. The plaintiff was therefore held entitled to recover the value of the goods sold. *Id.*

Under the Assessment Act, the assessment is for the purpose of designating the person to be charged, but no debt is due until the rate on the dollar is imposed, and the amount of taxes thus ascertained and fixed. By an agreement, dated 4th November, 1881, between one Q. and defendants, for the sale of Q.'s business, after a recital to the same effect, the defendant covenanted to pay, satisfy, and discharge all the debts, dues, and liabilities, whether due or accruing, contracted by said Q. in connection with said business, &c. Q. was assessed for goods sold under the agreement before the making thereof, but the rate was not imposed and the amount of taxes ascertained and fixed until May, 1882, thereafter:—Held, that there being no debt until the rate was struck in May, 1882, Q. when he sold the goods should have applied to have the purchaser's name inserted instead of his own, or have expressly provided in his agreement that the purchaser should indemnify him against this amount; and that the said taxes were not a debt contracted in connection with said business within the terms of the agreement. *Devanney et al. v. Dorr et al.*, 4 O. R., C. P. D. 206.

[See 45 Vict. c. 28, Ont.]

V. COLLECTION OF TAXES.

Issue of execution by the Receiver of taxes for city of St. John and arrest in default of payment—*Respondeat superior*. See *McSorley v. The Mayor, &c., of the City of St. John et al.*, 6 S. C. R. 531.

See *Chamberlain v. Turner et al.*, 31 C. P. 460. *supra*.

VI. COLLECTORS AND THEIR SURETIES.

A declaration, after setting out the defendant's duty as town clerk, under the Assessment Act, R. S. O. c. 180, in the preparation of the collector's roll, alleged that he omitted and neglected in certain years, to set down in said collector's rolls for the said years a large number of persons who appeared by the assessment rolls liable to assessment, &c. A further breach was that the defendant, in breach of his said duty, did not in said collector's rolls, &c., set down the assessed value of all property liable to assessment of a large number of persons whose names were set down in said rolls, whereby the plaintiffs lost large sums of money, payable to them as taxes, and they claimed \$2000:—Held, declaration bad; for that the first breach did not aver that the omission was made negligently, falsely, or dishonestly, but merely by mistake which would not render defendant civilly liable; while the second breach did not contain any allegation of negligence, bad faith, or even carelessness. Held, also, that the period for bringing the action was not limited to two years under R. S. O. c. 61, s. 1. *Corporation of the town of Peterborough v. Edwards*, 31 C. P. 231.

Quære, whether the defendant is only liable to conviction under sec. 189 of the Assessment Act, at the suit, or upon complaint, of the crown, or to a civil action by the plaintiffs as well. *Id.*

In an action against sureties for a town collector for his default in paying over the sum collected by him:—Held, (1) not necessary that the roll should be certified, but sufficient that it was signed by the town clerk; (2) that entries made by the collector on his roll in the discharge of the duties of his office of taxes paid to him were evidence against the sureties. *The Corporation of the Town of Welland v. Brown*, 4 O. R., C. P. D. 217.

The jury, without any evidence to justify such finding, allowed the collector a commission of three and a half per cent. on the taxes collected by him:—Held, that this amount could not be allowed, and that the amount against the sureties must be increased by this amount, less a sum of \$75, which appeared, by a by-law put in byleave on the motion, to be the proper amount of remuneration to the collector, on defendants' pleading a plea which would justify plaintiffs' in making such deduction. *Id.*

VII. SALE OF LAND FOR TAXES.

1. Proof of Taxes in Arrear.

In a suit commenced by a bill in the Court of Chancery, asking for an account of damages sustained by certain trespasses alleged to have been committed by the appellant (defendant) for an injunction and for possession, the principal question raised was whether a sale of the land for taxes, which took place on the 1st March, 1856, through and under which the respondent (plaintiff) claimed title, was valid. The evidence is fully set out in the report:—Held, that there was no evidence to shew the land sold had been properly assessed, and, therefore, the sale of the land in question was invalid. [Strong and

Gwynne, JJ., dissenting]. *McKay v. Cryslar*, 3 S. C. R. 436.

2. Crown Lands and Indian Lands.

In September, 1857, a lot in the township of Keppel, in the county of Grey, forming part of a tract of land surrendered to the crown by the Indians, was sold, and in 1869, the dominion government, who retained the management of the Indian lands, issued a patent therefor to the plaintiff. In 1870, the lot in question, less two acres, was sold for taxes assessed and accrued due for the years 1864 to 1869, to one D. K., who sold to defendant; and as to the said two acres, the defendant became purchaser thereof at a sale for taxes in 1873. The warrants for the sale of the lands were signed by the warden, had the seal of the county, and authorized the treasurer "to levy upon the various parcels of land hereinafter mentioned for the arrears of taxes due thereon and set opposite to each parcel of land," and attached to these warrants were the lists of lands to be sold, including the lands claimed by plaintiff. The lists and the warrant were attached together by being pasted the whole length of the top, but the lists were not authenticated by the signature of the warden and the seal of the county. By s. 128 of the Assessment Act, 32 Vict. c. 36, Ont., the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him, &c., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county, &c.:—Held, affirming the judgment of the court below, (1) That upon the lands in question being surrendered to the crown, they became ordinary unpatented lands, and upon being granted became liable to assessment. (2) That the list and warrant may be regarded as one entire instrument, and as the substantial requirements of the statute had been complied with, any irregularities had been cured by the 156th section, R. S. O. c. 180, (Fournier and Henry, JJ., dissenting). *Church v. Fenton*, 5 S. C. R. 239.

Where the crown-land commissioner had erroneously returned certain lands to the municipal officers as patented, whereas, although a patent had been prepared, it had never been intended to be operative, nor been delivered to the grantee, B., who had paid only part of the purchase money, and the lands were afterwards sold for taxes:—Held, the tax sales were of no validity as against M., to whom a patent was subsequently issued. *O'Grady v. McCaffray*, 2 O. R., Chy. D. 309.

3. Sheriff's Certificate.

A sheriff's certificate of sale for taxes is made for the purpose of giving the purchaser certain rights, in order to the protection of the property, until it is redeemed or becomes his absolutely, and forms no part of his title. The description in it being defective does not invalidate the sheriff's deed, nor, Semble, would its absence. *Nelles v. White*, 29 Chy. 338.

4. Deeds for.

(a) By whom to be executed.

The proper officers to execute the deed of land sold for taxes are the warden and treasurer at

the time the deed is demanded, not the persons holding those offices at the time of the sale. *Ferguson v. Freeman*, 27 Chy. 211.

(b) *Description of Land.*

Held, that the words "be the same more or less," following the description of the quantity of land, improperly inserted in the sheriff's deed, might be rejected as surplusage. *Nelles v. White*, 29 Chy. 338.

See *Ferguson v. Freeman*, 27 Chy. 211.

5. *Objections cured by Statute.*

Quære, (per Spragge, C.) whether the provisions of section 155 of the Assessment Act of 1869 apply where a sale of land took place before the Act, but the deed was not executed until after; or whether it applies only to a case where both were before or both after the enactment. *Ferguson v. Freeman*, 27 Chy. 211.

Per Fournier, Henry, and Gwynne, JJ.—Where it appears that no portion of the taxes has been overdue for the period prescribed by the statute under which the sale takes place, the sale is invalid, and the defect is not cured by s. 155 of 32 Vict. c. 36, Ont. Strong, J., dissenting, holding that s. 155 applied to a case where any taxes had in arrear at the date of the sale. *McKay v. Chrysler*, 3 S. C. R. 436.

Quære, whether since 36 Vict. c. 36, and preceding statutes, when some taxes are in arrear, but a sale has been made for more, the defect is cured. *Nelles v. White*, 29 Chy. 338.

Ejectment under a tax deed by the assignee of the purchaser, who was the township clerk. The sale was for the taxes alleged to be due for the years 1871 and 1872. In the assessment roll for 1871 the land was described as the "S. pt. 12, 53 acres;" and for 1872 as "S.E. pt. 12, 53 acres;" and it appeared that the land, whether taken as the south or south-east part, included portions of the lot owned respectively by F. and C., and on which they had paid their taxes; and also certain lots of a village laid out on part of 12:—Held, that the plaintiff's title failed; for that the assessment was illegal. Per Wilson, C. J., also that the evidence, set out in the report of this case, shewed that the defendant had, as between himself and the municipality, paid the taxes upon his part of the lot:—Held, also, that the defect was not cured by s. 155 of the Assessment Act of 1868, 32 Vict. c. 36, Ont. *Beckett v. Johnston*, 32 C. P. 301.

Where it appeared that, as far as the county treasurer was concerned, all the steps taken by him in regard to the sale were regular, and authorized by 32 Vict. c. 36, and that the sale had taken place for taxes actually in arrear for the required length of time, followed by a tax deed thereafter, which had not been questioned within two years:—Held, that the sale and deed were not afterwards impeachable, although it was not clear on the evidence, whether the county clerk and the assessor had or had not properly complied with the requirements of secs. 111 and 112 of the said Act. *Smith v. The Midland Railway Company*, 4 O. R., Chy. D. 494.

Held, that R. S. O. c. 180, s. 165, does not apply in a case where there have been no taxes in arrear at the time of the sale of the land for taxes. *Charlton v. Watson et al.*, 4 O. R., Chy. D. 489.

See *McNab v. Peer et al.*, 32 C. P. 545, p. 31; *Church v. Fenton*, 5 S. C. R. 239, p. 28.

6. *Other Cases.*

Where a sale of lands for taxes had taken place, and a suit was subsequently instituted by the purchaser to set aside a conveyance to the defendant executed after the registration of his own deed and the defendant impeached the deed executed in pursuance of such sale, it was shewn that a warrant had been at one time in the Court House, a portion of which was destroyed by fire, and that on that occasion the warrant had been probably consumed:—Held, sufficient evidence to authorize the court in admitting secondary evidence of its contents; which, on being taken established satisfactorily the existence and contents of such warrant: and, on rehearing, an objection being raised which had not been taken at the original hearing, that the township or county clerk should have been called to produce or negative the existence of a duplicate of such warrant:—Held, that if such proof were necessary, affidavit evidence to shew what was the fact should be received. *Ferguson v. Freeman*, 27 Chy. 211.

Under s. 1 of 37 Vict. c. 15, O. a tax deed is valid and binding unless questioned before a court of competent jurisdiction within two years by a person interested. One O., the defendant herein claiming under a sheriff's deed, given under an execution against lands, and also under a deed from one M., filed a petition under the Quieting Titles Act within two years from the obtaining of a tax deed by the plaintiff, who became contestant in the proceedings, and filed his claim under the tax deed, but, on the opposition of O., afterwards withdrew and abandoned it. Afterwards an order was made by the referee dismissing O.'s petition, which order was affirmed by a Judge on appeal, as she had failed to make out anything. At the time the execution issued under which O. purchased one of the parties to the suit was dead, and the interest of the others had passed to M. by conveyance from them to M. in trust to sell and apply the proceeds to pay their creditors, and the deed from M. was a breach of trust by M. with O.'s knowledge:—Held, that O. was not a person interested within the meaning of the Act, for that one of the parties being dead the sheriff's deed conveyed nothing, and neither did the deed from M., being a breach of trust:—Per Osler, J., the proceedings under the Quieting Titles Act were a questioning of the deed within the meaning of 37 Vict. c. 15. Per Wilson, C. J., the proceedings had no such effect, as the questioning must be a successful questioning. *McNab v. Peer et al.*, 32 C. P. 545.

Held, that the purchase under a tax sale by the township clerk was a voidable transaction; and per Wilson, C. J., the plaintiff, on the evidence had, or must be assumed to have had, notice of the infirmity of his vendor's title;

but, per Osler, J., there was no sufficient evidence of notice. *Beckett v. Johnston*, 32 C. P. 301.

The assessment of four lots, containing about 400 acres in the name of the plaintiff embraced seven acres already sold and separately assessed, of which fact the assessor was aware. The defendant purchased at a sale for taxes, and the plaintiff instituted proceedings impeaching the sale within two years thereafter:—Held, affirming the judgment of the Court below, that the assessment was illegal, and vitiated the sale. *Fleming v. McNabb*, 8 A. R. 656.

The municipal corporation of the county of H. in the province of Quebec, made an assessment roll according to law, in 1872. In 1875 a triennial assessment roll was made, and the property subject to assessment was assessed at \$1,745,588.58. In 1876, without declaring that it was an amendment of the roll of 1875, the corporation made another assessment in which the property was assessed at \$3,138,550. Among the properties that contributed towards this augmentation were those of appellants who, by their petition, or requête libellée, addressed to the Superior Court of Quebec, alleged that the secretary-treasurer of the county of H. was about selling their real estate for taxes under the provisions of the municipal code for the province of Quebec, 34 Vict. c. 68, s. 998 et seq., and prayed to have the assessment roll of 1876, in virtue of which the officer of the municipality was proceeding to sell, declared invalid and null and void, and that a writ of prohibition should issue to prevent the respondents from proceeding to sell. The Superior Court directed the issue of the writ restraining the defendants as prayed, but upon the merits, held the roll of 1876 valid as an amendment of the roll of 1875. The Court of Queen's Bench reversed this judgment on the merits, and held the roll of 1876 to be substantially a new roll, and therefore null and void:—Held, per Henry, Taschereau and Gwynne, JJ., affirming the judgment of the Court of Queen's Bench, that the roll of 1876 not being a triennial assessment roll, or an amendment of such a roll, was illegal and null, and that respondents were entitled to an order from the Superior Court as prayed for to restrain the municipal corporation from selling their property, and the writ which issued, whether correctly styled "writ of prohibition" or not, was properly issued, and should be maintained. Per Ritchie, C.J., Strong and Fournier, JJ., that a writ of prohibition issued under art. 1031, as was the writ issued in this case, will only lie to an inferior tribunal, and not to a municipal officer. The court being equally divided, the judgment appealed from was confirmed, but without costs. *Coté et al. v. Morgan*, 7 S. C. R. 1.

Under the Assessment Act of 1869, 32 Vic. ch. 36, the lands of railways might be sold for the non-payment of taxes. *Smith v. The Montreal Railway Company*, 4 O. R., Chy. D. 494.

See *Charlton v. Watson et al.*, 4 O. R. 489.

ASSESSMENT ROLL

See ASSESSMENT AND TAXES—MUNICIPAL CORPORATIONS—PARLIAMENT.

ASSIGNMENT.

- I. FOR THE BENEFIT OF CREDITORS—See BANKRUPTCY AND INSOLVENCY.
- II. FRAUDULENT ASSIGNMENT—See BANKRUPTCY AND INSOLVENCY—FRAUDULENT CONVEYANCES.
- III. OF GOODS AND CHATTELS—See BILLS OF SALE AND CHATTEL MORTGAGES.
- IV. OF CHOSSES IN ACTION—See CHOSE IN ACTION.
- V. OF MORTGAGES—See MORTGAGE.
- VI. OF PATENTS—See PATENT OF INVENTION.
- VII. OF SECURITIES—See PRINCIPAL AND SURETY.

Equitable assignment of goods. See *McMaster et al. v. Garland et al.*, 31 C. P. 320; 8 A. R. 1.

Absolute assignment of bond intended as a security only. See *Livingston v. Wood*, 27 Chy. 515.

ASSURANCE.

See INSURANCE.

ATTACHMENT OF DEBTS.

- I. WHO MAY ATTACH, 32.
- II. WHAT MAY BE ATTACHED, 32.
- III. EXAMINATION OF JUDGMENT DEBTOR, 34.
- IV. PRACTICE, 35.
- V. IN DIVISION COURTS—See DIVISION COURTS.

I. WHO MAY ATTACH.

Held, that a judgment creditor, whose judgment is for costs only, cannot examine his judgment debtor under R. S. O. c. 50, s. 304, nor garnish debts due to him. *Ghent v. McColl*, 8 P. R. 428.—Dalton, Q. C.

A judgment creditor in such a case may examine his judgment debtor under R. S. O. c. 49, s. 17. *Id.*

A defendant who has obtained executions upon a rule of court for the judgment of costs of the day by the plaintiff, is under R. S. O. c. 67, s. 12, and c. 66, s. 72, a judgment creditor, and entitled to garnish moneys due by the plaintiff. *Elliott v. Capell*, 9 P. R. 35.—Dalton, Master-Osler.

See *Leaming v. Woon*, 7 A. R. 42, p. 34.

II. WHAT MAY BE ATTACHED.

A debt is garnishable where it consists of money due under an award and decree of the Court of Chancery, although the full amount is

not ascertained by reason of the costs not having been taxed. *In re Sato v. Hubbard*, 8 P. R. 445.—Osler.

When the amount in such a case is finally ascertained, execution may be issued against the garnishee, although he still disputes his liability, and the judge is not bound to direct an issue. *Id.*

In garnishee proceedings a court of law will as against the attaching creditor, protect an attorney's lien for costs of the action or suit in which, or by which the debt attached has been recovered where the garnishee has notice of the lien. *Canadian Bank of Commerce v. Crouch*, 8 P. R. 437.—Osler.

A court of equity will restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered by means of a suit in equity to the prejudice of the attorney's lien for costs in that suit. *Id.*

The plaintiff claimed to be a creditor of O., and as such filed a bill, alleging that O. was mortgagee or otherwise entitled to some interest in the lands of M., and that O. was about to dispose of his interest therein in order to defeat the claim of the plaintiff, and prayed an account of what was due by O., and to restrain M. from paying O., and also an order for M. to pay plaintiff. At the hearing the court (Spragge, C.) made a decree referring it to the master to ascertain what was due by O. to the plaintiff, and if anything found due that O. should be ordered to pay the amount due to the plaintiff, with costs, but dismissed the bill, as against M., with costs. *Menzies v. Ogilvie*, 27 Chy. 456.

S. purchased lands with moneys payable to him by the crown for work done under a contract, which lands he had conveyed to his wife :—Held, that although the moneys could not be reached by garnishing them before being paid by the crown, yet that the money having passed out of the crown, by reason of the husband's appointment in favour of his wife, the effect was to defraud creditors, and the gift was therefore void under the statute of Elizabeth. *Nicholson v. Shannon—McPherson v. Shannon*, 28 Chy. 378.

The plaintiffs, who had recovered judgment against the defendant, W., filed a bill alleging that W., being the owner of lands subject to a mortgage, conspired with his co-defendant whereby a second mortgage was executed by W. to one A., who paid the money to the co-defendant, which was held by him as agent or trustee for W. The lands were subsequently sold in a suit by the first mortgagee, and realized sufficient to pay the two mortgages only. The plaintiffs proved their claim in that suit in the master's office, but received nothing. They alleged that they had been led to believe that the mortgage by W. to A. was bona fide, but had ascertained that such was not the fact; and prayed that the co-defendants might be ordered to pay over the amount paid out of the proceeds of the land to satisfy the mortgage in favour of A. :—Held, that the bill was in effect one to garnish the money due to W. in the hands of his co-defendant, and under the authority of *Horsley v. Cox*, L. R. 4 Ch. 92, and *St. Michael's College v. Merrick*, 1 A. R. 520; S. C. 26 Chy. 216, could not be maintained. *Gilchrist v. Wiley*, 28 Chy. 425.

G. was entitled under the will of C. to a life estate in land, and to the proceeds of personally to be paid to her by the executors. Judgment creditors of G. had had a fi. fa., goods returned nulla bona, but had not sued out a fi. fa. lands, when a receiver was appointed to the estate of C., whereupon the judgment creditors by petition, before the passing of the Ontario Judicature Act, applied for an order that the receiver might be directed to pay their judgment out of G.'s money in his hands; or that they might attach and sell G.'s life estate or, that the tenants of the realty might be directed to attorn to the petitioners and that they might be put in receipt of the rents and profits :—Held, (on appeal from Proudfoot, V.C.) that such petition had been properly dismissed, for the creditors were not in a position when they presented it either to garnish the personal estate, if that could have been done under the A. J. Act, 1873, or to seize the real estate under execution; and they had therefore no rights which the appointment of a receiver interfered with. But, Held, following *Re Cowans' Estate*, L. R. 14 Ch. D. 638, that the petitioners might now garnish the moneys in the hands of the receiver; and it being alleged that a fi. fa. lauds had since issued, the court upon payment of costs granted leave to the petitioners, under the prayer for general relief, to sue out such writs as they might be advised. *Leaming v. Woon*, 7 A. R. 42.

Held, affirming the judgment of Armour, J., that a negotiable promissory note, not yet due, is not a debt which may be attached within the meaning of Rule 370 of the O. J. Act. *Jackson v. Cassidy*, 2 O. R., Q. B. D. 521.

The defendant's father devised his estate to trustees upon the trust, among others, "to pay my son A. (the defendant) the interest of the sum of \$800 annually during the term of his natural life." An order was made by the master in Chambers, directing the trustees to pay over the interest from time to time accruing, to the plaintiff, who was a judgment creditor of the son. *Lloyd v. Wallace*, 9 P. R. 335.—Dalton, Master.

III. EXAMINATION OF JUDGMENT DEBTOR.

Where a judgment debtor disobeyed an order for his examination, he was directed to pay the costs of an application for a ca. sa., although the motion was dismissed upon his giving a sufficient excuse for his disobedience. *Imperial Bank v. Dickey*, 8 P. R. 24, 6 Galt.

In examination of a judgment debtor under R. S. O. c. 50, s. 304, the object of the enquiry is to shew what property or means the debtor has at the time of the examination which can be made available to the creditor, and the enquiry is not restricted to the period of the contracting of the debt, but it may be shewn that at some anterior time, no matter how far back, the debtor had property, as to which he may be required to give an account; and it is not a sufficient answer to the enquiry merely to say that it has all been disposed of before the debt was incurred. *The Ontario Bank v. Mitchell, et al.*, 32 C. P. 73.

The defendant recovered judgment against the plaintiff in the action for his costs of defence, on a judgment of nonsuit :—Held, that the plaintiff was not a judgment debtor, examinable under s.

17 R. S. O. c. 49, or s. 304 R. S. O. c. 50, or rule 366 O. J. Act. *McLachlin v. Blackburn*, 7 P. R. 287, dissented from; *Lovell v. Gibson*, 6 P. R. 132, commented upon. *Meyers v. Kendrick*, 9 P. R. 363.—Osler.

See *Ghent v. McColl*, 8 P. R. 428, p. 32.

IV. PRACTICE.

When serving a defendant with an order to examine him as a judgment debtor, it is not necessary to exhibit the original order, unless demanded, in order to entitle the plaintiff to move for a ca. sa. against him, under R. S. O. c. 50 s. 305. *Imperial Bank v. Dickey*, 8 P. R. 245.—Galt.

The affidavit on which to obtain an attaching order may be made by the attorney of the judgment creditor, or by a partner of the attorney. Semble, that proceedings on such order could not be prohibited on the ground that it was founded on a defective affidavit, that being a mere matter of practice. *In re Sato v. Hubbard*, 8 P. R. 445.—Osler.

Proceedings were taken before a county judge to garnish certain moneys, payable by the county to the plaintiff, as clerk of the peace and county Crown attorney, and which moneys that judge ordered to be attached in favour of the creditor, the present defendant. Thereupon, the debtor, the defendant in those proceedings, filed a bill in this court, seeking to restrain further action on such order:—Held, that this court had no jurisdiction to grant the relief asked; that the proper place to obtain such relief was by appeal to the Court of Appeal; and, without determining whether the claim of the debtor against the county, was such as could be garnished, the court (Proudfoot, V. C.) refused the motion for injunction, with costs. *Van Norman v. Grant*, 27 Chy. 498.

Held, that there is no appeal from an order made in garnishee proceedings in a County Court, under R. S. O. c. 50, s. 313, appeals from county Courts being expressly limited to the cases mentioned in s. 35 of the County Courts Act. Sec. 200 of the C. L. P. Act does not give a general appeal from the County Courts being controlled by the sub-heading preceding s. 189. *Sato et al. v. Hubbard*, 6 A. R. 546.

Semble, the question of the validity of a judgment should not be argued on the return of a garnishee summons, but should be raised on an application to set aside the execution. *Elliot v. Capell*, 9 P. R. 35.—Dalton, Master—Osler.

Held, that under rule 369, O. J. Act, an appointment signed by the examiner, and not a copy, must be served on the person to be examined. *Meyers v. Hendrick*, 9 P. R. 363.—Osler.

An examination under A. J. Act, ss. 17, 18 or of C. L. P. Act, s. 304, can only be taken under a rule of court or judge's order. *Ib.*

See *Canadian Bank of Commerce v. Crouch*, 8 P. R. 437, p. 33.

ATTACHMENT OF THE GOODS OF DEBTORS.

AGAINST ABSCONDING DEBTORS.—See ABSCONDING DEBTOR.

ATTACHMENT OF THE PERSON.

I. FOR CONTEMPT OF COURT, 36.

II. FOR NON-PRODUCTION OF DOCUMENTS OR ACCOUNTS, 37.

I. FOR CONTEMPT OF COURT.

A married woman, a judgment debtor, who refuses to attend and be examined as to her estate and effects, or refuses to disclose her property, or to give satisfactory answers to questions under R. S. O. c. 50, ss. 304, 305, may be committed for disobedience of the statute, notwithstanding the R. S. O. c. 67, s. 3. *Metropolitan Loan and Savings Co. v. Mara et ux.*, 8 P. R. 355—Wilson.

The order for commitment in such case is not mesne or final process, but punishment for disobedience of the statute. *Ib.*

Quære, as to the liability of a married woman to arrest. *Ib.*

A deputy sheriff was arrested under a writ of attachment for default in obeying an order upon his sheriff to deliver up to the claimant, who had succeeded on an interpleader issue, the goods, &c., seized. Upon a motion by the deputy to be discharged from custody, it was shewn that his non-compliance with the order arose from a difficulty in which he found himself by reason of the claim of another person who had succeeded in an issue about the same goods, and not from any deliberate intention to disregard the order; and his discharge was ordered. Semble, that the motion should have been for leave to administer interrogatories to or for the examination of the person committed, and for a habeas corpus. *In re Maitland, Gunther v. Cooke*, 9 P. R. 400.—Osler.

The sheriff of Oxford, in executing a writ of replevin, was obstructed by the defendant, who rescued the goods. On complaint of the sheriff's officer, they were summarily tried before a Police Magistrate and fined, under 32-33 Vict. c. 32, by which it is declared that any person discharged or convicted in such a case shall be released from all further or other criminal proceedings for the same cause. A motion afterwards made by the plaintiff to attach the same parties for contempt, was discharged, but without costs. *Haywood et al. v. Hay et al.*, 46 Q. B. 562.

Pending the injunction in this case, (see 4 O.R. p. 60), one P., who was not a party to the action, but was a member of the plaintiffs' association, on behalf of the association, hired one H. to work for him. McCord and Jenkins, members of the defendants' association, but not parties to the action, hearing of this went to H. and induced him to refuse to work for P. and to leave

Toronto. The court was of opinion that M. and J. knew of the injunction pending at the time. The plaintiffs did not state by their writ that they sued in any representative character, nor did they sue the defendants in a representative company, but the plaintiffs' affidavits stated that the plaintiffs represented their association and the defendants, theirs. On motion to commit M. and J. for contempt of process of the court:—Held, that the Master Plasterers' Association was not made a party to nor sufficiently represented in the action by the allegations in the plaintiffs' affidavits; and that no act against the plaintiffs individually having been established, M. and J. could not be held guilty of contempt for interference with the association and P.: that though the association might be added by amendment, the injunction would also have to be amended, and in the meantime M. and J. must be acquitted of contempt of the injunction as it now stood, and therefore the motion must fail. *Hynes v. Fisher*, 4 O. R., Q. B. D. 78.

On an application on behalf of the respondent H. to an election petition for an order nisi calling on the defendant, his opponent at the election, to shew cause why he should not be committed for contempt of court for publishing articles in his newspaper, reflecting on and prejudging the conduct of the respondent and the returning officer during the currency of an election petition:—Held, on the materials before the court, a prima facie case of contempt was made out; but as it appeared on the same materials that the respondent had attended and spoken at a meeting held for the purpose of approving of the conduct of the returning officer, and presenting him with a gold watch as a mark of such public approval, the applicant was also in fault, and the motion was refused. *In re Bothwell Election Case*, 4 O. R., C. P. D. 224.

II. FOR NON-PRODUCTION OF DOCUMENTS OR ACCOUNTS.

Where a party to be examined refuses to produce books, &c., as required by the notice to produce, served with the order to examine under R. S. O. c. 50, s. 161, or refuses or neglects to attend for examination, or refuses to be sworn or to answer lawful questions, pursuant to such order, proceedings against him by attachment must be taken before the court, and not before a judge in chambers. *Merchants' Bank v. Pierson*, 8 P. R. 123.—Osler.

Semble, that the action could not be dismissed under R. S. O. c. 50, s. 170 a, 41 Vict. c. 3, s. 3, for disobedience by the plaintiff of the notice to produce. *Ib.*

Held, also, that the refusal to produce the plaintiffs' books, under the facts stated in the report of the case, was not warranted. *Ib.*

A certificate given by a master that certain accounts filed under his order are not sufficient in substance and form, comes within G. O. 642, and cannot be enforced by attachment until confirmed by the lapse of a month. *Foster v. Morden*, 9 P. R. 70.—Proudfoot.

On motion for an order for the committal of one of the defendants for non-production of

documents under Rule 420 O. J. Act, which vests in the master in chambers the powers of the referee in chambers of the Court of Chancery. The master held that matters relating to the liberty of the subject having been excepted from the jurisdiction of the clerk of the crown and pleas under the former practice, are still beyond his jurisdiction by Rule 420, O. J. Act. *Keefe v. Ward*, 9 P. R. 220.—Dalton, Master.

ATTORNEY AND SOLICITOR.

I. PRIVILEGE OF, 38.

II. AGENT OF ATTORNEY, 38.

III. PROCEEDINGS AGAINST AND LIABILITY OF.

1. For Negligence, 39.

2. To Summary Jurisdiction, 40.

IV. AUTHORITY OF, 41.

V. RETAINER, 41.

VI. DEALINGS WITH CLIENT, 42.

VII. BILL OF COSTS.

1. Agreement as to Costs, 43.

2. Reference to Taxation or Revision.

(a) What may be Referred, 43.

(b) Time of Reference, 44.

(c) What Recoverable, 45.

(d) Practice, 46.

(e) Appeal from Taxation, 46.

3. Recovery by Suit, 47.

4. Other Cases, 47.

VIII. LIEN FOR COSTS, 47.

IX. MISCELLANEOUS CASES, 48.

X. ATTORNEY-GENERAL — See ATTORNEY-GENERAL.

I. PRIVILEGE OF.

Ordering attorney out of court in trial of contested election. See *South Oxford Election—Hopkins v. Oliver*, 1 H. E. C. 243.

II. AGENT OF ATTORNEY.

W. & Co., attorneys in the province of Quebec for B. & Co., there, requested the defendant, an attorney in the province of Ontario, to sue a company there on a promissory note made by them, of which B. & Co. were the holders. Defendant issued the writ in the name of B. & Co., and indorsed his own name as attorney. He, however, never had any communication with them, treating only with W. & Co., who had sent him many similar claims to collect, and crediting them with the amount of the note when collected:—Held, affirming the judgment of the County Court, that the plaintiff, who was the assignee of B. & Co., was entitled to recover from defendant the amount so collected; the rule that the town agent of a country principal is not accountable to a client of the latter not being applicable, as W. & Co., were merely the agents of B. & Co. to retain the defendant to act

as their attorney, between whom and W. & Co., a direct privity of contract therefore existed. *Ross v. Fitch*, 6 A. R. 7.

See *Re Idington v. Mickle*, 8 P. R. 566, p. 43; *Agnew v. Plunkett*, 9 P. R. 456, p. 46; *King v. Moyer*, 9 P. R. 514, p. 46.

III. PROCEEDINGS AGAINST AND LIABILITY OF.

1. For Negligence.

Where F., a solicitor, on behalf of his client, served a notice of sale under a mortgage made pursuant to the Act respecting short forms (R. S. O. c. 104,) upon what he believed, after diligent enquiry, was the last place of residence of the mortgagor in this province, and did so on the instructions of his client, who was fully advised as to the said enquiries and their result, and bona fide deeming such service sufficient:—Held, that F. was entitled, as against his client, to tax the costs of the proceedings under the power of sale, although it appeared the mortgagor really was at the time of such service, within this province. *O'Donohoe v. Whitty*, 2 O. R., Chy. D. 424, affirmed on appeal. See 20 C. L. J. 146.

R. S. O. c. 104, permits substitutional service at the residence though the mortgagor may be within the jurisdiction. But even if such is not the proper construction of the statute, it is a matter so doubtful that the solicitor who bona fide acted on that view of the statute should not lose his costs of so effecting service. *Id.*

Where services are rendered by a solicitor at the instance of a client, possessing the like knowledge of the matters of fact as the solicitor, the onus is on the client to establish negligence, ignorance, or want of skill, by reason of which alone and entirely the services have been utterly worthless, if he resist the taxation of costs incurred by such services. *Id.*

C., who was in active practice as a lawyer, and the author of several useful legal treatises, had obtained a mortgage on a valuable leasehold estate, and having taken such proceedings as resulted in a forfeiture of the mortgagors' term, procured from the owner of the property a renewal of the lease to himself. The mortgagors instituted proceedings to redeem, but C., asserting that he was absolute owner of the interest, instructed solicitors to defend the suit. They expressed to C. some doubt as to his right to resist the claim of the mortgagors, whereupon he, with one of the solicitors, went to a counsel of note, who, without having time to give the case full consideration, verbally advised them that the suit should be defended. C. drafted his answer, his solicitor adding one clause. Counsel retained for the hearing told C. he would undoubtedly fail in the litigation, and subsequently the usual decree for redemption was pronounced, C. being ordered to pay such costs as had been occasioned by his resisting redemption. It was alleged against the solicitors that they had advised C. that he would be entitled to costs in any event; that they had refused to consider or submit to him an offer to pay the mortgage money and costs, on the ground as they alleged that C. claimed about three times the sum offered; that they had colluded with the mortgagors' solicitor

in having proceedings instituted, which they had wrongly advised him to defend; and that he had a good defence, but the same had been negligently managed. There was a written retainer, which did not express any special arrangement as to costs or the terms on which the defence was to be conducted. The court being of opinion that C. had failed to make good his charges against the solicitors, affirmed the order made by Spragge, C., reversing the finding of the taxing officer that the solicitors were not entitled to recover the costs of the litigation. Although in a simple case of a distinct assertion and a distinct denial of a fact at the time of a client retaining a solicitor, which thus forms a part of a contract it may be a proper rule to say that in such a case the solicitor has himself to blame when any difficulty arises, as he might have protected himself by having his retainer in writing, there is not any authority for extending that rule to facts arising after the retainer and during the progress of the litigation. In any event the rule applies only where it is simply oath against oath, not where there is other evidence direct or circumstantial in support of the solicitor's. *Re Kerr, Akers & Bull, Solicitors*, 29 Chy. 188.

2. To Summary Jurisdiction.

The fact as to whether moneys collected by an attorney had been afterwards loaned to him by the client was disputed; but an undertaking was produced, signed by the attorney to the effect that he held the investment:—Held, that if the transaction was afterwards turned into a loan to the attorney, he must be prepared with the clearest evidence of the change in the relation, otherwise the usual order against the attorney must be made; and in this case the evidence was held to be insufficient:—Held, that where an order directing a reference to the master has been made in Chambers, in such a case, and the reference completed under it, an application for relief therefrom must be made to the court. *In re an Attorney*, 8 P. R. 102.—Osler.

To justify an order to strike a solicitor off the rolls there must be personal misconduct; it is not enough to shew that his partner has been guilty of fraudulent conduct, from which a constructive liability to pay money may perhaps arise. The court is not in the habit of exercising even the lesser jurisdiction of ordering payment in a summary manner against a solicitor to whom personally no blame is attributable, though he may be responsible for his partner's acts. *St. Aubyn v. Smart*, L. R. 3 Ch. 646 distinguished. *Re McCaughy and Walsh, Solicitors*, 3 O. R., Chy. D. 425.

Where at the hearing matters are brought to the notice of the court which affect the character of one of the parties—a solicitor—the court will, of its own motion, and without being applied to by any other party, call upon such solicitor to shew cause why he should not be called upon to answer these matters. *In re A Solicitor*, 27 Chy. 77.

Upon the taxation of solicitors' costs against their client, it was shewn that large sums of money belonging to their client had reached their hands, and after deducting the amount of the

costs a considerable balance remained due to the client, for which he had, under the order of taxation, issued an execution, but the sheriff had been able to realise only a small portion of the debt; and thereupon a motion was made to strike the solicitors off the roll in default of payment of the amount remaining due. The court (Blake, V. C.), however, in view of the fact that the client had treated the claim as a debt from the solicitors to himself, and proceeded to a sale of all that he could seize under execution, was of opinion that he could not fall back on a right which he had had and might have exercised, unless, in addition to the non-payment of the money, misconduct on the part of the solicitors could be shewn that would warrant the interference of the court; and refused the application, with costs. *Re Fletcher et al.*, 28 Chy. 413.

On the presentation of a petition to restore a solicitor to the rolls, who had been struck off by an order of 1st September, 1874, for non-payment over of a client's money, evidence was required as to his good conduct since the making of the order, and notice to the Law Society of the application, and on this being complied with he was restored, but the order was not rescinded. *Re Macnamara, a Solicitor*, 9 P. R. 497.—Proudfoot.

IV. AUTHORITY OF.

It is within the power of a solicitor to settle a suit on behalf of his client, where the settlement is in good faith. *McDonald v. Field*, 9 P. R. 220. *Dalton, Master*. [This decision was overruled by the Divisional Court of C. P. not reported].

L., being the holder of a mortgage upon which an instalment of interest was due, instructed his attorneys "to take legal proceedings on the securities unless the interest was paid on the 12th April." The mortgagee called on the 12th April, and told the attorneys that he intended to pay off the mortgage shortly, and hoped no costs would be incurred. On the 15th April the attorneys issued a writ of ejectment, and prepared notice of sale, and served them on the mortgagee on 23rd April, when he called to pay off the mortgage. They also refused to take the principal money:—Held, that the attorneys had no authority to collect the principal, and that they were entitled to the costs of the ejectment suit, but to no other costs whatever. *In re Flint and Jellett, Attorneys*, 8 P. R. 361.—Wilson

See also, *Johnston v. Johnston*, 9 P. R. 259; *Brown v. Sweet*, 7 A. R. 725.

V. RETAINER.

The defendant's testator was a sheriff and official assignee under the Insolvent Act of 1875. The plaintiff was solicitor for the City Bank, and also for one B., upon whose petition one G. F. was placed in insolvency. The official assignee became creditors' assignee. At the first meeting of creditors, B. being chairman, the plaintiff, representing the City Bank, whose claim amounted to nearly the whole indebtedness, moved a resolution to sell certain goods of the insolvent, that the assignee should take the

necessary proceedings to realize the assets, and recover certain property alleged to belong to the insolvent, and for that purpose to retain counsel, if necessary. B. became inspector of the estate, and consulted with the plaintiff, and on his advice instructed the assignee to defend and bring actions. The assignee was obliged to pay costs and damages in an action brought against him to recover goods wrongfully taken by him; and he also paid the plaintiff some costs, whereby the assets of the estate were exhausted, and a small sum in addition paid by the assignee out of his own funds. The defendant's testator was subsequently removed from the office of assignee, and a new assignee appointed, whereupon he presented a petition to the Insolvent Court, in which he alleged that he had retained the plaintiff, and had been put to great expense in bringing and defending suits as assignee, and had become liable to pay large sums of money in respect thereof, and prayed payment by the new assignee, which was refused. The plaintiff delivered his bills to the defendant's testator in his lifetime. After the death of the testator the plaintiff wrote a letter to one of his sons about the costs, in which, in relating the facts, he stated that he was attorney for the bank. The plaintiff now sued the personal representative for his unpaid costs of the proceedings carried on by him. *Senkler, Co. J.*, who tried the case, found that the retainer was not a personal one by the assignee, but that the plaintiff had acted for the benefit of the creditors, and was in fact their solicitor:—Held, *Armour, J.*, dissenting, affirming the judgment of *Senkler, Co. J.*, it was a question to be determined on the evidence whether the retainer was a personal one by the assignee, or whether he was acting merely on the instructions of creditors; that upon the evidence the plaintiff was solicitor for the creditors and not for the assignee personally; and, notwithstanding the admission contained in the assignee's petition, he had not incurred any personal liability for the costs. *Per Armour, J.* The presumption is, that when a solicitor is retained, the person retaining him is liable for the costs, and to avoid liability he must shew some special agreement to the contrary; and the evidence here not only did not displace the presumption, but shewed that the testator had always considered himself liable for the costs. *Per Hagarty, C. J.* It is the duty of a solicitor to inform his client, when a trustee, as to the advisability of taking proceedings and incurring costs, when it may become a question whether the costs will have to be paid out of his private funds or of the trust fund or estate. *Butterfield v. Wells*, 4 O. R., Q. B. D. 168.

See *Re Kerr—Akers and Bull*, 29 Chy. 188, p. 40.

VI. DEALINGS WITH CLIENT.

In a foreclosure suit the defendant alleged that the plaintiff, a solicitor, had been employed by him in April, 1878, to procure a loan of \$1,400, which he required to pay off a mortgage for \$2,000, on which there was due \$2,120, and that taking advantage of the information so acquired, the plaintiff had purchased the mortgage for himself at the price of \$1,400. It appeared that the defendant had, in the spring of 1877, obtained a loan of \$600 on a portion of the land in

question, through the plaintiff acting as agent and legal adviser of a loan company: that in January following, the defendant had applied to the plaintiff, acting in the same capacity, to procure a small loan from the company on the land in question, which the plaintiff told him he could not recommend to the company: that afterwards one B., who held the \$2,000 mortgage, tried to sell it to the company through the plaintiff, who, finding that the land comprised in it did not come up to the value required by the company, wrote B. to that effect, and subsequently the plaintiff, who denied that the defendant had ever requested him to obtain the \$1,400 loan, purchased the mortgage for himself for \$1,625:—Held, reversing the decree of Blake, V. C., 27 Chy. 429, that the evidence, which is fully set out in the case, shewed that the defendant had not applied to the plaintiff for the \$1,400 loan, and that there was no confidential or fiduciary relationship existing between the parties which precluded the plaintiff from purchasing the mortgage. *Kilbourn v. Arnold*, 6 A. R. 158.

VI. BILL OF COSTS.

1. Agreement as to Costs.

Under an agreement between the defendants and their solicitor, he was to be paid a fixed salary, to cover all his professional services to the city, exclusive of counsel fees and other disbursements paid by him, but he was to have the right to costs from parties against whom the corporation should succeed, and be entitled only to disbursements when they should fail. In a case in which the defendants succeeded, judgment was entered against the plaintiff and the usual costs taxed. On motion for revision:—Held, Wilson, C.J., dissenting, following *Jarvis v. Great Western R. W. Co.*, 8 C. P. 280, that as under their agreement the defendants were not liable to pay the attorney the costs taxed except disbursements, all costs except disbursements must be disallowed. Wilson, C. J., thought *Jarvis v. Great Western R. W. Co.* not a satisfactory decision, and opposed to the later case of *Galloway v. Corporation of London*, L. R. 4 Eq. 90. *Stevenson v. Corporation of the City of Kingston*, 31 C. P. 333.

The agreement to pay a solicitor a fixed sum as a yearly salary in lieu of paying items in detail, is neither illegal or unusual, whether it provides for the past or the future. *Falkiner v. Grand Junction R. W. Co.*, 4 O. R., Chy. D. 350.

See *Re Malcolmson and Wade*, 9 P. R. 242, p. 44; *Arnoldi v. O'Donohoe*, 2 O. R. 322 p. 45.

2. Reference to Taxation or Revision.

(a) What may be Referred.

Charges by a solicitor who acted as agent for the principal solicitor, are subject to taxation though the principal receives a commission. Upon such taxation a master should without special direction regard any settlement arrived at between the solicitors. *Re Idington v. Mickle*, 8 P. R. 566.—Boyd.

Costs of sale under power of sale in a mortgage. See *Re Crerar and Muir*, 8 P. R. 56; *Re McDonald, McDonald & Marsh, Ibs.*, 88; *Re Cronyn, Kew & Betts, Attorneys, Ibs.* 372.

(b) Time of Reference.

Where a client applies for taxation of an attorney's bill after the expiration of a year from its delivery, he should shew such special circumstances as would have justified a reasonable man in not previously seeking a taxation, or that he was prevented by some unavoidable cause. Where judgment had been signed against the client in an action on the bill during the pendency of negotiations for a settlement, this was held a sufficient reason for directing a taxation after the year. *Pattullo et al. v. Church*, 8 P. R. 363.—Cameron.

A solicitor sued his client in a Division Court for the amount of his bill of costs. While the action was standing for judgment the client obtained from the master in chambers an order for taxation. Pending an appeal from that order judgment was given, which shewed that all the items in the bill which were in dispute were considered and adjudicated upon:—Held, notwithstanding, that considering the nature of the charges and the circumstances disclosed in the affidavits filed on the application, the order of the Master was right. *Re Burdett, a Solicitor*, 9 P. R. 487.—Osler.

On a sale of property under a power in a mortgage, the solicitors more than a year before this application, with the approbation of the agent of the mortgagee (who was out of the country) retained out of the proceeds of the sale a lump sum for their costs, and delivered no bill:—Held, a special circumstance under R. S. O., c. 140, s. 44, entitling a subsequent incumbrancer to have a bill of costs in detail delivered to him upon payment of the costs of a copy. *Re Malcolmson and Wade, Solicitors*, 9 P. R. 242.—Boyd.

On July 20, 1877, A. and B., a firm of solicitors, rendered their bill to C., also a solicitor, for professional services. On May 30th, 1878, C. wrote to A. and B. claiming a reduction of the bill, and alleging over charge, and an agreement to do the work for half fees. No notice was taken of this letter, nor did C. take steps to have the bill taxed. On July 8th, 1882, A and B. sued in the County Court on this bill, and judgment was entered therein on July 19th, 1882, for default of appearance, which judgment was, by consent, subsequently waived. On July 27th, 1882, a bill for services rendered subsequently to July, 1877, was delivered to C. by A. and B. In this bill was included the following item:—"To amount of judgment entered July 19th, 1882, \$268.67 for previous accounts rendered." An action was then commenced in the Chancery Division for the amount of the two bills. On the trial of the action, judgment was given for the amount of the first bill, as rendered, and also for the amount of the second bill, subject to taxation:—Held, on appeal to the Divisional Court, that neither the existence of a controversy as to the terms on which the business was done, nor the continuance of the employment after the delivery of the first bill, were "special circumstances" within R. S. O. c. 140, s. 35, entitling C.

to tax the first bill after the lapse of a year :—Held, also, that the reference in the second bill to the amount claimed in respect of the first bill did not amount to a rendering of the first bill so as to entitle the client to a taxation. *Arnoldi v. O'Donohoe*, 2 O. R., Chy. D. 322.

See *Re Solicitors*, 9 P. R. 90, p. 47.

(c) What Recoverable.

The plaintiff, an attorney, was the official assignee of an insolvent estate. He brought an action on behalf of the estate, and used his own name as the attorney on the record. The plaintiff obtained a verdict :—Held, that under s. 32 of the Insolvency Act, 1875, he was entitled to tax disbursements only against the defendant. *Agnew v. Ross*, 8 P. R. 67.—Osler.

A master or a single judge has no discretion to allow a solicitor more than \$1 per hour for attendance on the taxation of a bill of costs, either between solicitor and client, or party and party : the tariff being fixed at that rate by G. O. 608. *Re Totten*, 8 P. R. 385.—Proudfoot.

Where costs as between solicitor and client were to be paid by the plaintiff to the defendant, and where it appeared that the defendant's solicitor had at the request of his client, made in good faith and on reasonable grounds travelled from Sarnia to Toronto, to attend on the examination of the plaintiff on the bill :—Held, on appeal from the master, that the defendant could tax against the plaintiff a sum of \$60, paid to defendant's solicitor for two days services and travelling expenses. *Gough v. Park*, 8 P. R. 492.—Proudfoot.

An administrator *ad litem* had allowed suits to be brought in his name without the sanction of the Court, which both he and his solicitor had been notified it was necessary should be obtained and a sum of \$2,738.37 for costs in respect of such suits had been paid out of the funds to the solicitor, which it was alleged had been so paid improvidently. The court in a suit by the executors against the administrator *ad litem*, directed the taxation of the solicitor's bill where a sum of \$2,012.81 was disallowed, and thereupon the sureties for the administrator, who was unable to pay, applied by petition for an order that the solicitor should repay this amount with costs. The court (Proudfoot, J.), under the circumstances, made the order asked, although no taxation of the costs as between the solicitor and his client had been had, and it was denied that any arrangement existed that the solicitor should only be paid such costs as the administrator might be allowed against the estate ; or that any privity existed between the solicitor and the executors, and a bill filed by the executors against the administrator and his solicitor had as against the latter been dismissed with costs on the ground of such want of privity ; such dismissal not having been on the merits could not be claimed to be *res judicata*. *Crooks v. Crooks*, 1 Chy. 57, remarked upon and followed. *Re Donovan-Wilson v. Beatty*, 29 Chy. 280. Reversed on Appeal, 9 A. R. 149.

Interest may be allowed on a solicitor's bill of costs, if a demand in writing is made for it. *In re McClive et al., Solicitors*, 9 P. R. 213.—Wilson.

The taxing officer has no power to allow interest, unless the matter has been specially referred to him by the order for taxation. *Ib.*

The plaintiff, during the pendency of a motion for interim alimony, returned to her husband :—Held, that the defendant must pay the costs as between solicitor and client of the plaintiff's solicitor. *Leonard v. Leonard*, 9 P. R. 450.—Dalton, Master.

Necessary letters between a solicitor and his agent on the business of the cause are taxable as between party and party, whether the agent resides in the county town of the county in which the solicitor resides, or in another county, or in Toronto. *Agnew v. Plunkett*, 9 P. R. 456.—Osler.

The plaintiff, a solicitor, obtained a verdict for damages and costs in an action for libel, in which, although another solicitor appeared as acting for him in all the pleadings and proceedings in the suit, he actually did the work, and carried on the suit himself :—Held, on appeal from the taxing officer, that full fees and disbursements except "instructions," had been properly allowed to him, and that his acting as agent for the solicitor whose name appeared in the proceedings as his solicitor did not affect his right. *King v. Moyer*, 9 P. R. 514.—Hagarty.

See *In re Flint and Jellott, Attorneys*, 8 P. R. 361, p. 41.

(d) Practice.

Where an order is made for taxation of an attorney's bill, as between attorney and client, under the R. S. O. c. 140, s. 49, a common law court has no power here, as it has in England, under the 6 & 7 Vict. c. 73, s. 43, to make a summary order for payment of the amount found due from the client, except by consent. *In re A. B. and C. D., Attorneys*, 8 P. R. 126.—Osler.

Bills of costs between solicitor and client should *prima facie* be referred for taxation to the master of the county in which the work was done. *Re Idington and Mickle*, 8 P. R. 566.—Boyd.

An order for the taxation of a solicitor's bill, at the instance of the client, should refer the bill simply for taxation. A clause in such order directing payment to the solicitor of the amount of the taxed bill was struck out. *Re Clarke*, 9 P. R. 197.—Dalton, Master.

See *Re Solicitors*, 9 P. R. 90, p. 47.

(e) Appeal from Taxation.

When an order is obtained by a client referring the taxation of a solicitor's bill to the master in the county where the work was done, any review of the master's conclusions must be obtained by way of appeal to a judge. *In re Blecker and Henderson*, 9 P. R. 182.—Boyd.

Held, that the notice of appeal from a certificate of taxation of a solicitor's bill of costs by the local master at St. Thomas, must be seven days, as required by G. O. 642. Such a case is not within rule 449 O. J. Act. *Exchange Bank v. Newell et al.*, 9 P. R. 528.—Proudfoot.

3. Recovery by Suit.

In an action by a solicitor to recover the amount of a bill of costs, the fact that he does not, in his statement of claim, allege that the bill was delivered a month before action brought, is not now, any more than before the Judicature Act, ground for demurrer, but only for defence. *Seane et al. v. Duckett et al.*, 3 O. R., Chy. D. 370.

Though under R. S. O., c. 140, sec. 32, the right of action on a bill of costs may be suspended pending a month from delivery, nevertheless the solicitor is a creditor, and may as such, before the expiration of such month, bring an action to set aside a voluntary conveyance as fraudulent and void. *Id.*

See also, *Duff v. Canadian Mutual Fire Ins. Co.*, 9 P. R. 292; S. C., 2 O. R. 560.

4. Other Cases.

An order for partition or sale was made under the recent G. O. 640, by the master at London, of the estate of one M., deceased. In proceeding under that order the master advised for creditors, and M. & M. sent in a claim for obtaining letters of administration, and for defending an action in the court of C. P., brought by W. M., a defendant in this suit, and entitled to a share of the estate, against the administratrix. The master allowed the claim, and W. M. appealed, on the ground that neither the deceased nor his estate was indebted to M. & M. and that they were not entitled to prove as creditors in this cause:—Held, that she was justified in defending the suit, and the appeal was dismissed. *McKay v. McKay*, 8 P. R. 334.—Proudfoot.

On an application to tax a solicitor's bill more than a month having elapsed since its delivery, an order was issued in the long form in use before the O. J. Act instead of the form under rule 443, as the master is mentioned in that order but the taxing officer is the proper officer to tax bills of costs under rule 438 of the Act. *Re Solicitors*, 9 P. R. 90.—Stephens, *Referee*.

Fraud having been charged against a defendant, who was a solicitor, and the charge being wholly unsupported:—Semble, that it would have been proper not merely to deprive the plaintiff of her costs, but to allow such defendant all his costs. *Freed v. Orr et al.*, 6 A. R. 690.

VIII. LIEN FOR COSTS.

A defendant's solicitor as a plaintiff's solicitor may have a lien for costs on a fund in court. A bill was filed by a purchaser against the vendor for rescission or specific performance of a contract for sale of lands in the county of Simcoe, made

the 12th day of October, 1870, and registered in July, 1875, and by the decree made in October, 1876, the plaintiffs were ordered to pay certain overdue purchase money. C., a creditor of the defendant, having placed a fi. fa. lands in the hands of the sheriff of Simcoe in December, 1878, obtained a stop order in January, 1879, against the purchase money in court. The defendant's solicitor claimed a prior lien for costs of this suit but had obtained no stop order:—Held, on the application of the defendant's solicitors for payment of the fund to them, that their lien had priority. Part of the fund in court was a balance of purchase money paid into court by the plaintiff in March, 1879, pursuant to the decree on further directions made in October, 1878. C. seeking to attach this balance, in addition to his stop order obtained in January, 1877, placed a fi. fa. goods in the hands of the sheriff of York in February, 1879:—Held, that as to this balance the solicitors' lien had also priority. *Wardell v. Trenouth*, 8 P. R. 142.—Stephens, *Referee*.

In garnishee proceedings a court of law will, as against the attaching creditor, protect an attorney's lien for costs of the action or suit in which or by which the debt attached has been recovered, where the garnishee has notice of the lien. *Canadian Bank of Commerce v. Crouch*, 8 P. R. 437.—Osler.

A court of equity will restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered by means of a suit in equity, to the prejudice of the attorney's lien for costs in that suit. *Id.*

The lien extends only to the costs incurred in the particular suit or proceeding, and not to the attorney's general costs against the client in other matters. *Id.*

IX. MISCELLANEOUS CASES.

Audit of county attorney's account in connection with administration of criminal justice. See *In re Fenton County Crown Attorney of the County of York and The Board of Audit of the County of York*, 31 C. P. 31.

The plaintiff, knowing that the defendants were a firm of solicitors, advanced to one A. money upon a joint note signed by him and by one of the defendants in the firm's name, without the knowledge or consent of his partner. No usage or general mutual authority to sign notes in the name of the firm was proved, and it was admitted that the plaintiff had no knowledge of the transactions relied upon to shew such authority. A verdict was given for defendants in the County Court, and a rule nisi to set it aside refused:—Held, that the plaintiff could not recover against both defendants, but that the defendant who signed the note was liable. *Wilson v. Brown, et al.*, 6 A. R. 411.

Knowledge of solicitor—how far binding on client. See *The Real Estate Investment Company v. The Metropolitan Building Society*, 3 O. R. 476; *Brown v. Sweet*, 7 A. R. 725.

Liability of solicitor for slander of title. See *Ontario Industrial Loan and Investment Co. v. Lindsey et al.*, 4 O. R. 473; 3 O. R. 66.

ATTORNEY-GENERAL.

Held, affirming the judgment of Proudfoot, V. C., 26 Chy. 126, that the doctrine of escheats applies to Ontario; that the Attorney-General for Ontario is the proper person to represent the Crown and to appropriate the escheat to the uses of the province; that the Court of Chancery has jurisdiction in such a case; and that it was proper for the Attorney-General to file a bill in the Court of Chancery to enforce the escheat. *Attorney-General of Ontario v. O'Reilly*, 6 A. R. 576.

Held, reversing the decision of Spragge, C. (28 Chy. 65), that the Attorney-General for Ontario, representing only a limited portion of the public, with whom, if at all, a contract existed for the construction of a bridge by a company incorporated by the Dominion Parliament, from Canada to the United States, across the Niagara River, had no locus standi. *Attorney-General v. The International Bridge Co.*, 6 A. R. 537. See also *S. C.* 27 Chy. 37.

The work being one within the jurisdiction of the parliament of Canada, that parliament, presumably with the knowledge of the state of the bridge, allowed debentures to be issued upon it:—Held, upon this ground also the Attorney-General of Ontario was not the proper party to file the information. *S. C.*, 6 A. R. 537.

As to necessity of a public nuisance being moved against by the Attorney-General. See *Hathaway v. Doig*, 28 Chy. 461.

Semble, but for the language used in *Guelph v. The Canada Company*, 4 Chy. 656, the proper frame of a suit by a municipality against a railway company for trespassing by running their track along one of the streets of the municipality without their consent would be by way of information in the name of the Attorney-General with the corporation as relators. *Penelon Falls v. Victoria Railway Co.*, 29 Chy. 4.

On an indictment, containing four counts for obtaining money by false pretences, was endorsed: "I direct that this indictment be laid before the grand jury. Montreal, 6th October, 1880:—By J. A. Mousseau, Q.C.; C. P. Davidson, Q.C.; L. O. Loranger, Attorney-General. Messrs. Mousseau and Davidson were the two counsel authorized to represent the crown in all the criminal proceedings during the term. A motion supported by affidavit was made to quash the indictment on the ground, inter alia, that the preliminary formalities required by s. 28 of 32 and 33 Vict. c. 29 had not been observed. The chief justice allowed the case to proceed, intimating that he would reserve the point raised, should the defendant be found guilty. The defendant was convicted, and it was held, on appeal, reversing the judgment of the Court of Queen's Bench, that under 32 and 33 Vict. c. 29, s. 28, the Attorney-General could not delegate to the judgment and discretion of another the power which the legislature had authorized him personally to exercise to direct that a bill of indictment for obtaining money by false pretences be laid before the grand jury; and it being admitted that the Attorney-General gave no directions with reference to this indictment, the motion to quash should have been granted, and the verdict ought to be set aside. *Abrahams v. The Queen*, 6 S. C. R. 10.

To an action on a drainage by-law to compel a municipal corporation to complete a drain, and also to restrain a misapplication of moneys assessed, and for an account, the Attorney-General not a necessary party. See *Smith v. The Corporation of the Township of Raleigh*, 3 O. R., Chy. D. 405.

AUCTION AND AUCTIONEER.

BIDDING AT SALE OF LANDS BY ORDER OF THE COURT—See SALE OF LAND BY ORDER OF THE COURT.

In a bill filed by a mortgagor against his son, a bidder at the sale by another of the defendants, a loan company, to which bill the company and one B. were also defendants, it was alleged that it had been agreed between the son and B. that in consideration of the son's securing to B. a debt of the plaintiff, B. would advance the deposit necessary to enable the son to buy the land at the sale; that the son should attend and buy in the land, which he accordingly did; that in consequence of B.'s refusal to make the promised advance, the son was unable to carry out the sale: that the bidding of the son deterred others present from bidding, and that B. afterwards privately bought the land at a great under-value to the loss of the plaintiff:—Held, on demurrer, that the bill sufficiently, though inartificially, alleged that by reason of B.'s agreement and refusal to make the advance agreed upon, he had occasioned an abortive sale, and profited thereby to the loss and damage of the plaintiff. *Campion v. Brackenridge*, 28 Chy. 201.

The defendant having sold land by auction under a decree of the Chancery Division, was convicted of a breach of the by-law of the county of Huron, passed pursuant to the Municipal Act R. S. O. c. 174, s. 465 sub-s. 2, providing that it should not be lawful for any person to sell by public auction any wares, goods, or merchandize of any kind without a license:—Held, that the conviction was clearly bad, for the by-law did not refer to lands; nor would the statute have authorized such a by-law. *Regina v. Chapman*, 1 O. R., Q. B. D. 582.

As to effect of misrepresentations in sale by auction. See *Stammers v. O'Donohoe*, 8 A. R. 161; 28 Chy. 207.

Power of factor to sell by auction for repayment of advances without special authorization. See *Mitchell v. Sykes*, 4 O. R., Chy. D. 501.

AUDIT.

Of county attorney's accounts. See *In re Fenton*, and the Board of Audit of the County of York, 31 C. P. 31; *In re Stanton and the Board of Audit for the County of Elgin*, 3 O. R. 86.

AVERAGE.

See SHIP.

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BAIL.

I. ABSCONDING DEBTOR AT SUIT OF THE CROWN, 51.

II. RENDER OF BAIL AND RELEASE OF SURETIES, 51.

III. SPECIAL BAIL—COSTS UNDER R. S. O. C. 50 s. 343, 52.

IV. IN CRIMINAL MATTERS—See CRIMINAL LAW.

I. ABSCONDING DEBTOR AT SUIT OF THE CROWN.

In an action at the suit of the crown an order was made for a writ of attachment against defendant as an absconding debtor. Service of the writ was accepted by his attorney, who entered an appearance to the writ :—Held, that this was a useless proceeding, and that defendant should have put in special bail. *Regina v. Stewart*, 8 P. R. 297.—Osler.

Held, also, that the forfeiture of a recognizance to appear was a debt sufficient to support the application for an attachment under the Absconding Debtor's Act. *Ib.*

Held, that the amount for which special bail is to be put in need not be mentioned in the order for the writ. *Ib.*

II. RENDER OF BAIL AND RELEASE OF SURETIES.

The sureties on a statutory bail bond under a writ of *ne exeat provinciâ* have no power to surrender their principal as at common law. An application by sureties for discharge from a bond and for re-payment of the money paid to the sheriff as collateral security was refused. *Richardson v. Richardson*, 8 P. R. 274.—Proudfoot—Sprague.

Where a party is entitled to an assignment of a bond, and to realize it for his own benefit, his rights are the same in regard to money deposited; and where in an alimony suit the statutory bond under a writ of *ne exeat* has been given, the plaintiff is entitled to have the moneys deposited as collateral security therefor, paid into court, and applied in discharging arrears of alimony. *Ib.*

The defendant was arrested under a *ca. sa.* and afterwards admitted to bail. The trial was in the vacation before Michaelmas Term, and the render in the vacation after that term. The plaintiff having omitted to charge the defendant in execution during Hilary Term :—Held, on an application for a supersedeas, that the render in Michaelmas vacation related back to the preceding term, which should count as one of the two terms within which the plaintiff must charge the defendant in execution, under Reg. Gen. H. T. 26 Geo. III. The defendant was therefore discharged. *Golding v. Mackie*, 8 P. R. 237.—Osler.

Judgment was signed against defendant in

Michaelmas term, and he was rendered in discharge of his bail in the vacation following :—Held, on an application for a supersedeas, that the render related back so as to include Michaelmas as one of the two terms within which the plaintiff must charge the defendant in execution; and that not having been charged in execution until Easter Term he was entitled to his discharge. *Wheatley v. Sharpe*, 8 P. R. 307.—Osler.

Where a person is once supersedeable for want of being charged in execution, he always continues so, even though he is afterwards charged in execution, before the application for a supersedeas. *Ib.*

An application for a supersedeas was entertained, although a similar application in the same case had already been dismissed. *Ib.*

Where a defendant is arrested by a sheriff under a *ca. re.* and after verdict is surrendered by the bail to the same sheriff upon an action being commenced against them, the sheriff is not entitled to a copy of the bail-piece before receiving the prisoner into custody; and where such refusal was given, the sheriff was compelled to pay the costs of an application to stay proceedings, and an order was made to extend the time for surrender. *Grierson v. Corbett*, 8 P. R. 517.—Osler.

Where the plaintiff in an alimony suit obtains a writ of arrest and the defendant gives bail, and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked paid into court, to be applied from time to time in payment of the alimony and costs: and, *Semble*, that upon such payment the sureties are entitled to be discharged from their bond. *Nedham v. Nedham*, 29 Chy. 117.

Where, under a writ of arrest, a caption takes place, the sheriff is entitled to a bond for double the amount marked upon the writ. *Ib.*

III. SPECIAL BAIL—COSTS UNDER R. S. O. C. 50 s. 343.

Defendant was arrested and held to bail for a debt alleged by plaintiff to be \$704, but the plaintiff recovered only \$489. As to \$80 which the plaintiff failed to recover, it was held on the facts stated in the report of the case that he had no reasonable ground for believing defendant to be liable and he abandoned it at the trial, but as to the other portion for which he failed he had reasonable ground :—Held, the plaintiff was entitled to tax his costs of defence against the plaintiff under R. S. O. c. 50 s. 343. *Porritt v. Fraser*, 8 P. R. 430.—Osler.

BAILMENT.

Where possession is changed it need not be given personally to the creditor, purchaser or mortgagee; it may equally be given to a trustee or bailee for him, and the debtor may increase the claim of such bailee or may charge the goods with further sums in favour of other persons. *McMaster et al. v. Garland et al.*, 31 C. P. 320.

See, also, *Oliver v. Newhouse*, 32 C. P. 90; *Troop v. Hart*, 7 S. C. R. 512.

BALLOT.

* See PARLIAMENT.

BANKRUPTCY AND INSOLVENCY.

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IV. TAKING MALICIOUS PROCEEDINGS IN BANKRUPTCY—See MALICIOUS ARREST, PROSECUTION, AND OTHER PROCEEDINGS.

I. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. *Execution of*.

The assignment in this case was executed by one partner, at the request of his co-partner, in the partnership name, and was made at the request of several creditors :—Held, that the assignment was properly executed, and that there was sufficient assent of the creditors. *Nolan v. Donnelly et al.*, 4 O. R., C. P. D. 440.

2. *What Property Passes*.

On the 26th May, 1880, two chattel mortgages were executed by the plaintiff to one J. G. One mortgage was to secure \$215, and interest; the other being a security for certain promissory notes of the mortgagor endorsed by the mortgagee, which had been discounted by the defendant, who was the holder thereof. On the 24th July, both the mortgages, together with the goods and chattels comprised therein, were

assigned to defendant by J. G. On the 22nd July, previously, R. G. and J. G., who had been trading in partnership, assigned to O. and K., upon trust for the benefit of creditors, amongst other things, all the grain, farm stock, crops, whether growing or cut, and other chattels and effects of the said assignors, or either of them, wheresoever situate, and also all mortgages and all other personal estate wheresoever situate of the said assignors, or either of them, or in which any of them had any right or interest :—Held, that the terms of the deed of assignment to O. and K. were sufficient to include these mortgages and the goods comprised in them, and therefore, as regarded the first-named mortgage, there being no contrary intention, it passed under the deed, so that the subsequent assignment of that mortgage to the defendant was of no avail; but as regarded the other mortgage, the defendant being the beneficial owner thereof, as holder of the notes secured thereby, and the mortgagee having no interest therein, there could be no intention that it should pass under the deed, and therefore it passed to the defendant under the assignment to him :—Semble, that there was evidence to shew that the plaintiff recognized the defendant's title as assignee. *Sutton v. Armstrong*, 32 C. P. 11.

3. *Hindering and Delaying Creditors*.

An assignment in trust for creditors of a small stock of goods valued at about \$230, and some land, made to a person not a creditor, contained a provision empowering the assignee, without consulting the creditors, to carry on the business, and wind it up, no time being stated therefor: to pay all salaries, wages, &c., and all advances made in goods and money for conducting said business in the winding up thereof, to the best advantage, which advances he was authorized to make, and also to sell the said land as to him should seem meet, and to retain a reasonable compensation for the execution of the said trusts :—Held, Wilson, C. J., dissenting, affirming the judgment of Hagarty, C. J., that the assignment was void, as containing provisions hindering and delaying creditors, and such as they could not reasonably be required to agree to. *Gallagher v. Glass*, 32 C. P. 641.

An assignment in trust for creditors contained a clause which, amongst other things, empowered the trustee to sell for cash or on credit, and with or without security for the unpaid purchase money :—Held, that the introduction of the words "with or without security" was immaterial, and did not invalidate the assignment, there being no proof of any design on the part of the debtors to so enable the trustee to unfairly delay the realization of the assets. *O'Brien et al. v. Clarkson*, 2 O. R., Q. B. D. 525.

4. *Creditors holding Security*.

The plaintiff, the holder of a chattel mortgage with a covenant for payment, was not scheduled in proceedings in insolvency under the Act of 1875, but he was aware of the proceedings, and the insolvent obtained a final discharge :—Held, that the debt under the chattel mortgage was not extinguished. A subsequent common law assignment for the benefit of creditors was made by the

debtor of all his property to the defendant in trust to pay expenses, &c., and "to apply the balance in or towards payment of the debts of the assignor in proportion to their respective amounts without preference or priority."—Held, that the plaintiff was entitled to sue for the whole debt, and therefore to share in the estate proportionately under the deed for the whole, and that he was not bound to value his security and rank for the balance only. *Beaty v. Samuel*, 29 Chy. 105.

II. INSOLVENT ACTS OF 1864, 1869, 1875, AND 1879.

1. Jurisdiction of Insolvent Court.

In 1875, J. M. and D. M. entered into partnership, certain assets of J. M. being transferred to the partnership, but nothing being said as to his liabilities. In 1876, the firm having become insolvent, B. was appointed assignee. The partnership creditors were paid in full, and a surplus remained. D. M. then petitioned the county judge in insolvency to divide the said surplus between him and J. M.—B. then commenced this suit against D. M. to have it declared that the said partnership deed was not binding upon him as such assignee, but that the partnership deed might be declared fraudulent and void, and that the court might take an account of the partnership property, and make division, and for an injunction restraining D. M. from further proceeding with his petition:—Held, that the Insolvent Court had jurisdiction to deal with the matter, and this being so, was the proper tribunal to do so, and this court would not interfere. *Bell v. McDougall*, 2 O. R., Chy. D. 618.

2. Who may come under.

One C., a practising barrister, dealt largely in land transactions, but it was not shewn that he depended thereon for his living. Becoming insolvent, proceedings under the Insolvent Act of 1875 were taken against him. The plaintiff was assignee of a mortgage made by C., and brought suit thereon against H., the assignee in insolvency of C., and D. and others, the owners of parts of the mortgaged lands. It was objected by D. that C. should have been made a party:—Held, that C. was not a trader within the meaning of the Insolvent Act and that nothing passed to the assignee in the insolvency proceedings. C. was therefore declared to be a necessary party, and leave was given to add him as a defendant. *Joseph v. Haffner*, 29 Chy. 421.

This was an appeal from a judgment of the Supreme Court of Nova Scotia, making the rule nisi taken out by the respondents absolute to set aside verdict for plaintiff and enter judgment for the defendants. The action was brought by C. as assignee of L. P. F., under the Insolvent Act of 1875, for several trespasses alleged to have been committed on the property known as the Shubenacadie Canal property, and for conversion by C. et al. to their own use of the ice taken off the lakes through which that canal was intended to run. The declaration contained six counts, the plaintiff claiming as assignee of F. Among the pleas were denials of committing the alleged wrongs, of the property being that of the plaintiff, and of his possession of it, the last plea

being that "the said plaintiff was not, nor is such assignee as alleged." After the trial both counsel declined addressing the Judge, and it was agreed that a verdict should be entered for the plaintiff with \$10 damages, subject to the opinion of the court, that the parties should be entitled to take all objections arising out of the evidence and minutes, and that the court should have power to enter judgment for or against the defendants with costs. A rule nisi for a new trial to be granted accordingly, and filed. The rule was taken out as follows:—"On reading the minutes of the learned Judge who tried the cause, and the papers on file herein, and on motion, it is ordered that the verdict entered herein formally by consent subject to the opinion of the court, with power to take all objections arising out of the evidence and minutes, and with power to the court to enter judgment for or against defendants, with costs, be set aside with costs and a new trial granted herein." This rule was made absolute in the following terms:—"On argument, etc., it is ordered that the rule nisi be made absolute with costs and judgment entered for the defendants against the plaintiff with costs." Thereupon plaintiff appealed to the Supreme Court of Canada, and it was:—Held, (Henry, J., dissenting), that by traversing the allegation of plaintiff being assignee, the defendants put in issue the fact implied in the averment, that the plaintiff was assignee in insolvency, and that F. was a trader within the meaning of the Insolvent Act of 1869, and as the evidence did not establish that F. bought or sold in the course of any trade or business, or got his livelihood by buying and selling, that the plaintiff failed to prove this issue: Per Gwynne, J.: Assuming F. to be a trader still the defendants were entitled to judgment upon the merits, which had been argued at length. That the agreement at nisi prius authorized the court to render a verdict for plaintiff or defendant according as they should consider either party upon the law and the facts entitled; that the court, having exercised the jurisdiction conferred upon it by this agreement, and rendered judgment for the defendants, this court was also bound to give judgment on the merits, and as judgment of the court below in favour of the defendants was substantially correct to sustain it; and it having been objected that as the rule nisi asked for a new trial the rule absolute in favour of defendants was erroneous, that such an objection was too technical to be allowed to prevail, and that the rule nisi, having, as it did, recited the agreement at nisi prius, and the court below having rendered a verdict for the defendants, it should be upheld, except as to the plea of liberum tenementum, which should be found for the plaintiff or struck off the record, and that to order a new trial could be but to protract a useless litigation at great expense. *Creighton v. Chittick et al.*, 7 S. C. R. 348.

3. Repeal of Act.

The repeal of the Insolvent Act does not affect any insolvent whose estate has vested in the assignee prior to the repeal. *Cooper v. Kirkpatrick*, 8 P. R. 248.—Dalton, Q. C.

Held, that the doctrine of pressure which obtained before the insolvency laws now occupies

the same position since their repeal. *Brayley v. Ellis et al.*, 1 O. R., Chy. D. 119. Affirmed on appeal. See 20 C. L. J. 144.

Quære, whether, where an insolvent's estate vested in an assignee under the Insolvent Act before its repeal, the action for the alleged fraud was a proceeding that might be continued thereunder under the terms of the repealing Act, 43 Vict. c. 1, Dom., or of the Interpretation Act, 31 Vict. c. 1, Dom.; and whether, also, the s. 136 of the Insolvent Act of 1875 was ultra vires of the Dominion Parliament. Remarks as to the difference between s. 136, and the corresponding provision in s. 92 in the Insolvent Act of 1869. *Lightbound v. Hill*, 32 C. P. 294.

See *Peck et al. v. Shields et al.*, 6 A. R. 639, p. 63; *Clarkson et al. v. White et al.*, 4 O. R. 663, p. 58.

4. Preferential Assignments.

Action of debt by the plaintiff claiming under a deed of composition and discharge, as assignee of the assignee in insolvency of a co-partnership, whereby the debt in question was assigned to him. Plea, setting out the deed whereby the plaintiff covenanted with all the creditors, collectively and severally, to pay them and each of them 50c on the \$ of their respective claims against the said insolvent firm, and on confirmation of the deed to pay the costs respecting the insolvent firm's estate * * and the preferential claims against the said firm, in consideration of which "the said creditors" released to the insolvents their claims against them, and directed a conveyance of the insolvent firm's estate to them, and plaintiff averring that at the time of the assignment of the debt to the plaintiff there were separate debts of the insolvent, or one of them, unpaid and unsatisfied, which were not provided for by the deed :—Held, that the deed provided for the payment of firm creditors only, and did not include separate creditors, and therefore that the plaintiff's title to the debt failed. *McKittrick v. Haley*, 46 Q. B., 246.

See II. 6 (b) p. 59.

5. Assignee.

(a) What Property vests in.

Upon the death of one member of a firm, and the subsequent insolvency of the surviving partners, the joint estate passes to their assignee in insolvency. But where the capital of surviving partners having been lost, they, while the estate was supposed to be solvent, conveyed the same to a trustee for creditors upon the request of the executrix of a deceased partner in consideration of a release by her from all liabilities; and the executrix afterwards, upon obtaining probate conveyed her interest to the trustee; and subsequently through a shrinkage in value the estate became insufficient to meet the liabilities, it was :—Held that by the assignment to the trustee, at the request of the executrix, for valuable consideration, they had parted with all interest in the estate and nothing passed to the plaintiff, as assignee, under proceedings in insolvency taken on the supposition that the assignment to the trustee was an act of insolvency, and that the assignment to the trustee not being questioned on the ground of fraud, the assignee of the

survivors was precluded from any enquiry. *Davidson v. Papps*, 28 Chy. 91.

A mortgagor and mortgagee dealt together for some years without having any settlement of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off in favour of the mortgagor for the balance due him on their general dealings :—Held, affirming the finding of the master that such right of set-off passed to the official assignee of the mortgagor, and that a transferee of the security took it subject to the equity. *Court v. Holland*, 29 Chy. 19.

It appearing that part of C.'s assets was certain railway stock, obtained by him on a contract, that he was to retain one-half, if he could give the stock a marketable value, but that if he could not do so within a certain time, extending beyond the period of the insolvency proceedings, the transaction was to be void, and he was to re-transfer :—Held, that the shares should have been returned in his sworn statement as part of his assets, for the language of the statute was large enough to cover such an interest. It was a valid executory contract, and as such passed on insolvency to the assignee. *McGee v. Campbell*, 2 O. R., Chy. D. 130; 28 Chy. 308.

The payee of a promissory note made and payable in Ontario, who had absconded to Michigan, while there, and after a writ of attachment in insolvency had issued against him in Ontario, endorsed the note for good consideration to the plaintiffs, who took it bona fide. Evidence was given to prove that by the law of Michigan the endorsement was sufficient to pass the note to the plaintiff :—Held, reversing the judgment of the County Court, that the plaintiffs could not recover, as the title to the note had vested in the assignee before the endorsement, and that his rights thereto could not be affected by the law of Michigan. *Jenks et al. v. Doran*, 5 A. R. 558.

An assignee in insolvency is entitled to all the earnings of an insolvent which are earned after the assignment in insolvency, and before discharge, over and above what is necessary for the reasonable maintenance of the insolvent and his family. Therefore, where an insolvent, pending his discharge, applied part of his earnings in the purchase of land for the benefit of his wife :—Held, that to the extent of earnings so applied the assignee was entitled to a lien on the land. *Clarkson et al. v. White et al.*, 4 O. R., Chy. D. 663.

Held, also, that the repeal of the Insolvent Acts by 43 Vic. c. 1 (D), before claim made, was no bar thereto, the estate of the insolvent having vested in the assignee before April 1st, 1880, and there having been no reconveyance of the property to the insolvent, who had, however, obtained his discharge before action brought. *Ib.*

See also *Woodward et al. v. Shields*, 32 C. P. 282; *Troop v. Hart*, 7 S. C. R. 512.

(b) Rights, Duties, and Liabilities.

An assignee in insolvency bona fide suing in discharge of his duty as such assignee, will not be required to give security for costs on the ground that he is without means and not beneficially interested in the suit. *Vars v. Gould*, 8 P. R. 31.—*Stephens, Referee.*

The plaintiff, an attorney, was the official assignee of an insolvent estate. He brought an action on behalf of the estate and used his own name as the attorney on the record. The plaintiff obtained a verdict:—Held, that under section 32 of the Insolvent Act of 1875, he was entitled to tax disbursements only against the defendants. *Agnew v. Ross*, 8 P. R. 67.—Osler.

In trover for goods against an assignee in insolvency,—Held, following *Re Barrett*, 5 A. R. 206, that the assignee may object to the absence of a bill of sale on an alleged sale by the insolvent just as an execution creditor or subsequent purchaser for value may do. *Snarr v. Smith*, 45 Q. B. 156.

Upon the insolvency of the lessees, there were goods upon the premises belonging to them, and other goods stored with them, sufficient to pay the taxes in arrear; and a warrant being issued, the bailiff notified the assignee, but forbore to distrain on the assignee's promise to pay, which promise was confirmed by the inspectors of the estate. The goods having been afterwards removed, an order was made directing the assignee to pay the taxes forthwith, with all costs. *In re Bowes, Insolvents*, 5 A. R. 353.

Held, affirming the judgment of the County Court, that under sec. 67 of the Insolvent Act of 1875, all debts exceeding \$100 must be sold separately, unless where there is a sale of the whole estate en bloc; and the purchaser of such a debt, otherwise than the section directs, cannot recover against the debtor. *Fisken v. O'Neill*, 6 A. R. 99.

The rule of law which requires a mortgagee selling under a power of sale in his mortgage to observe the terms of such power, is also applicable to sales by a trustee or quasi trustee acting under a power—the power must be followed, and the rule applies with equal force to sales by an assignee of an insolvent estate, under the Act of 1869, sec. 47, who in such cases acts under a statutory power authorizing a sale, “but only after advertisement thereof for a period of two months.” An assignee proceeded to sell the lands of the insolvent without giving notice of such intended sale “for a period of two months” as prescribed by the Act, no sanction of the creditors thereto, having been given:—Held, a good objection to the title by a vendee of the purchaser at such sale. *In re Jarvis v. Cook*, 29 Chy. 303.

Retainer of solicitor by assignee under Insolvent Act 1875. Liability for costs. See *Butterfield v. Wells*, 4 O. R. 168.

6. Proof of Debts.

(a) Creditors holding Security.

Under the Insolvent Act of 1875, a creditor holding security at the time of the insolvency, cannot realize the security, and prove on the estate for the balance. *Re Hurst*, 31 Q. B. 116, commented upon. *Re Beaty, an Insolvent*, 6 A. R. 40.

See *Beaty v. Samuel*, 29 Chy. 105, p. 55.

(b) Partnership Debts.

Where, upon the dissolution of a firm, the

business is continued by one of the partners, who assumes the liabilities, the joint assets remaining in specie are primarily applicable to the payment of the joint creditors of the firm. *Re Walker, an Insolvent*, 6 A. R. 169.

Held, that under sec. 88 of the Insolvent Act of 1875, if the dividend is derived wholly out of joint estate, the joint creditors alone can share until fully paid; if wholly out of separate estate, it belongs entirely to separate creditors till they are paid, and if partly out of each class of assets, it should be divided pro rata between each class of debts. *Ib.*

See *McKittrick v. Haley*, 46 Q. B. 246, p. 57. See, also *Mills et al. v. Kerr et al.*, 7 A. R. 769; *Kerr The Canadian Bank of Commerce*, 4 O. R. 652.

(c) Set-off.

By a lease, made by the defendant to the insolvents, the lessees were “to get pay for improvements at a fair valuation, and to have the right of purchase during the term “by paying the lessor first all claims by way of notes, or otherwise he holds, or may hold against the said lessees, and the sum of \$235.15 as purchase money,” &c. In January, 1875, an attachment under the Insolvent Act of 1869, was issued; and in March defendant filed his claim, which included a note for \$500, most of which sum had been expended in improvements, and had been obtained for that purpose. There had been a valuation of the improvements at the end of the term in 1877, at \$275, in which defendant did not take part, and the assignee sued defendant for that sum on his covenant:—Held, *Armour, J.*, dissenting, that the note formed an equitable if not a legal set-off against the claim; that the right to such set-off was matter of procedure, and governed therefore by the Act of 1875, not the Act of 1869; and that defendant was not precluded by having proved his claim. *Quære*, whether under the lease the payment of defendant's claim was not a condition precedent to his paying for improvements. *Mason v. Macdonald*, 45 Q. B. 113.

The difference between our insolvent law, as to set-off, and that in England and the United States remarked upon. *Ib.*

Per *Armour, J.*, the question was governed by the Act of 1869, and the plaintiffs' claim not being liquidated, the defendant's claim could not be the subject of set-off. *Ib.*

(d) Interest.

After payment by an insolvent's estate of 100 cents in the dollar the creditors claimed interest on their claims out of a surplus in the hands of the assignee:—Held, (reversing the decision of the court below) that notwithstanding the provisions of sec. 99 of the Insolvent Act, interest was payable on all debts originally bearing interest by contract or otherwise, but not where it was claimable by law as damages only:—Held, also, that the claim to such interest was properly brought before the court by petition filed by the inspectors, who, acting under a resolution of creditors, had requested the assignee to pay such interest. *In re McDougall*, 8 A. R. 309.

7. *Fraud and Fraudulent Preferences.*(a) *Transactions Protected.*

The defendants discounted at a bank a promissory note which A. had given them, and on maturity it was paid to the bank out of A.'s moneys within thirty days of his insolvency. In an action by the assignee to recover the amount from the defendants as being a payment within s. 134 of the Insolvent Act of 1875:—Held, reversing the decision of the County Court, that they were not liable, as the payment was not made to them, but to the bank, who were the actual creditors. *Miller v. Harvey*, 6 A. R. 203.

D. had been in the habit of obtaining from the defendant discounts, at an exorbitant rate of interest, of notes received by D. in the course of his business, very few, if any, of which were paid at maturity so that in the course of about two years' dealings D.'s indebtedness amounted to about \$7,000. At this time D., who was represented as a man of very sanguine temperament, entered into a new line of business after obtaining goods on credit to the amount of \$4,000 or \$5,000, having represented to the persons supplying such goods that, although without any available capital, he had experience in business. About twelve days afterwards, D., being threatened by a mortgagee with foreclosure proceedings, which, if persisted in, would have had the effect of closing up his business, applied to the defendant, who advanced him \$300, part of which was applied in paying the overdue interest on the mortgage, and the surplus in retiring a note of D.'s held by the defendant, who granted D. an extension of time on other notes held by himself at a reduced rate of interest (if paid promptly); and the defendant then intimated to D. that he would have to work carefully to get through. In a suit impeaching the mortgage to the defendant, it was Held (reversing the decree pronounced by Spragge, C.) that the plaintiff had not satisfied the onus which was cast upon him by the Insolvent Act, of shewing that the mortgage given by D. had been so given in contemplation of insolvency; and, the presumption of law being in favour of innocence and fair dealing, the bill was dismissed, with costs. *McCrae v. Whyte*, 7 A. R. 103.

K. had a line of discount with the defendants of \$20,000, for which \$5,000 collaterals were deposited as security. Sometime afterwards his indebtedness to the bank was nearly doubled when the agent insisted upon obtaining additional security by deposit of further collaterals, and which some months before the insolvency were deposited. This was impeached by the assignee in insolvency of K. as being an unjust preference of the bank:—Held, affirming the decision of the court below, that the transfer to the defendants, of the securities as collaterals was valid, the plaintiff having failed to establish that K. contemplated insolvency: Held, also, that the want of knowledge by the defendants' manager would not have availed the defendants, if the insolvent had, in fact, made the transfer in contemplation of insolvency. *Nelles v. The Bank of Montreal*, 28 Chy. 449; 7 A. R. 743.

Another transfer had been made to the bank within thirty days of the insolvency, which was also impeached, but upon the faith of which the bank had made advances to K. exceeding the

value of the securities so transferred, which would not otherwise have been made:—Held, that the bank had not thereby obtained an unjust preference, and therefore the transaction could not be impeached. *Id.*

The insolvent made a cash payment of \$1,000 to the bank a few days before his insolvency, but it was sworn that he had been allowed to overdraw upon an agreement to cover it by this payment, and it was not shewn that the bank manager had, at that time, probable cause to believe in his inability to meet his engagements in full:—Held, that this money could not be recovered back. *Id.*

Upon the arrangement for a deed of composition and discharge, the creditors required security for payment of the composition, and one Meikle, a creditor, agreed to endorse the composition notes upon receiving a mortgage upon the property settled upon the insolvent's wife, securing him in respect of his endorsements, and on payment of \$250 in addition to his composition:—Held, not a fraudulent preference within the meaning of the Act. *Re Russell*, 7 A. R. 777.

A mortgage is a "contract" within the meaning of the Insolvent Act of 1875, sec. 130:—Held, in the circumstances stated in the report of this case, that the defendant might hold a mortgage in his favour created by a person in insolvent circumstances for certain advances made by the mortgagees contemporaneously with the execution of the incumbrance, and also for future advances intended to be secured thereby, though it was not shewn that such advances were made for the purpose of enabling the mortgagor to carry on his business, but that such mortgage was not a valid security for antecedent advances made by the mortgagee, nor for notes endorsed by the mortgagee for the mortgagor, but not paid, in respect of which therefore he had been a surety only, not a creditor. *Smith v. Harrington*, 29 Chy. 502.

See *Davidson v. Maguire*, 27 Chy. 482; 7 A. R. 98; *Re Russell*, 7 A. R. 777, p. 66. See, also, *Boustead v. Shaw*, 27 Chy. 280.

(b) *Transactions Avoided.*

The bill was filed by the assignee in insolvency of one T., to set aside a mortgage given by him shortly before his insolvency, alleging that the defendant T. N., who was endorser of a note for \$2,000 made by T., procured the mortgage in question for that amount to be made in the name of his brother J. N., and that he gave J. N. the \$2,000 with which the note was retired. T. N. swore that he paid J. N. the money in discharge of a debt due by him to J. N. and P. N., another brother. J. N. also swore that the mortgage moneys belonged to him and P. N., but their evidence was uncorroborated, and P. N. was not called:—Held, reversing the decree of Proudfoot, V. C., that under the suspicious circumstances which surrounded this case, the onus was wholly upon the defendants, to prove not only that a debt was due from T. N., J. N. and P. N., but that the money received by them in payment thereof had been honestly advanced to T. on the security of the impeached mortgage, which the evidence set out in the report failed to establish. The rule laid down in *Merchants' Bank v.*

Clarke, 18 Chy. 594, that transactions of this kind should not be held sufficiently established by the uncorroborated testimony of the parties thereto—approved of. *Morton v. Nihan et al.* 5 A. R. 20.

The plaintiffs, who were sub-contractors for the stone and brickwork of a public school, and who were to receive payment from the principal contractors, who alone were recognized by the public school board, procured an assignment to themselves of the balance due them by the contractors for their completed work, and payable to the contractors by the board. The contractors were at the time unable to pay their debts, which the plaintiffs knew, and an attachment in insolvency issued against them within three months after the assignment of the claim:—Held, affirming the judgment of Proudfoot, V. C., that the transaction was an unjust preference under sec. 133 of the Insolvent Act of 1875; and, Semble, that it was also within the meaning of secs. 130 and 132, and the plaintiffs could not maintain a suit to enforce payment of the balance assigned to them. *Griffiths et al. v. Parry Assignee*, 6 A. R. 672.

(c) *Fraud in obtaining Goods or Credit.*

Where a judgment has been recovered for a debt without fraud being charged under s. 136 of the Insolvent Act of 1875, the plaintiff is barred by such recovery from bringing another action against the debtor charging the fraud, even although the judgment was recovered by default, for the plaintiff might have declared, averring such fraud, and had the question tried. *Lightbound v. Hill*, 32 C. P. 249.

The plaintiffs sued for goods sold and delivered to defendants who were insolvents, and under s. 136 of the Insolvent Act of 1875, charged the defendants with fraud in procuring the goods on credit, knowing themselves to be unable to meet their engagements, and concealing the fact from the plaintiffs, thereby becoming their creditors with intent to defraud them. The defendants were domiciled in Ontario, and the contract was made in England:—Held, affirming the judgment of the Court of Common Pleas, reported in 31 C. P. 112, that the act charged was not a crime, nor the charge of fraud a criminal proceeding, but merely a proceeding at the instance of a private person to enforce payment of a debt; and it made no difference therefore that the contract out of which the cause of action arose, was made in England. *Peck et al v. Shields et al.*, 6 A. R. 639. Affirmed in Supreme Court, see 20 C. L. J. 65.

Per Spragge, C. J. O., and Morrison, J. A.—Sec. 136 of the Insolvent Act of 1875, dealing with matter of procedure incident to the law of bankruptcy and insolvency, was within the jurisdiction of the Parliament of Canada to enact. *Ib.*

Per Burton, J. A.—Sec. 136, which gives certain creditors an additional remedy in the Provincial Courts for the recovery of their debts in full, is *ultra vires* of the Parliament of Canada; but s. 8, sub-s. 7 of the Insolvent Act of 1864, to the same effect, is still in force, the Parliament of Canada having no power to repeal it. Per Patterson, J. A. It is immaterial whether s. 136 is *ultra vires* or not; for if the Parliament of Canada had the

power to deal with the subject of that section, it would be binding, but if not, then the same enactment in s. 8, sub-s. 7, of the Act of 1864, is unrepealed and in force. *Ib.*

See *Lightbound v. Hill*, 32 C. P. 249, p. 57.

8. *Discharge.*

Under secs. 56 and 57 of the Insolvent Act of 1875, a judge has no power to grant an insolvent his discharge, where he has failed to keep a cash book and account books suitable for his trade, even although such omission may not be due to any fraudulent intention. *Re Gooding, an Insolvent*, 5 A. R. 643.

Held, that the insolvents were not entitled to a discharge under sec. 65 of the Insolvent Act of 1875, as the facts set out in the report of the case, did not shew that their failure to pay a dividend of fifty cents in the dollar was caused by circumstances arising more than one month after the mailing of the declaration of insolvency, for which they could not be justly held responsible within the meaning of the third proviso to that section. Quære, as to the effect of neglecting to mail such declaration to each creditor, as required by that section. *In re Galbraith and Christie*, 5 A. R. 358.

Where an insolvent omits to keep books of account suitable for his trade, he is not entitled to an immediate discharge under the Insolvent Act of 1875, though such failure may not be owing to any improper motive. In this case, however, as the insolvent had kept certain books, which although imperfect were honestly meant as a business record, his discharge was only suspended for three months. *Re Bullivant, an Insolvent*, 5 A. R. 638.

The insolvent swore to an affidavit verifying the statement of liabilities and assets, but inadvertently omitted the statement of the causes to which he attributed his insolvency, which, however, he made verbally at the first meeting of creditors, where the contestant was present. This defect was not pointed out for more than a year, and after the discharge had been applied for, and the insolvent then swore to another affidavit supplying the omission:—Held, reversing the decision of the Judge of the County Court, that the omission to furnish the statement within seven days from the assignment under s. 17, was immaterial, as it expressly gave the right to correct or supplement the statement which had been done:—Held, also, that under s. 57, the omission complained of would not disentitle the insolvent to his discharge, as it was not wilful:—Held, also, that under the circumstances more fully set out in the report of the case, the opposing creditor was estopped from objecting to the omission. *Re Martin and English, Insolvents*, 5 A. R. 647.

To an action by a commercial traveller for wages, defendants pleaded a deed of composition and discharge in insolvency. The plaintiff replied that the claim was privileged:—Held, reversing the judgment of the Q. B. 45 Q. B. 188, that privileged claims are not within the class of debts mentioned in sec. 63 of the Insolvent Act of 1875, to which a discharge does not apply without the consent of the creditor. *Fryer v. Shields et al.*, 6 A. R. 57.

Held, affirming the judgment of Cameron, J., that under the Insolvent Act of 1864, s. 9, sub-s. 5, a discharge in insolvency would form no answer to proceedings upon a judgment against the defendant for seduction. *Benninger v. Thrasher*, 9 P. R. 206; 1 O. R., Q. B. D. 313.

In 1866 judgment was recovered against the defendant in this action for breach of promise of marriage, and in another for seduction. The defendant then made an assignment under the Insolvent Act, 1864, having no assets, and his only creditors being the plaintiffs in the two actions. No creditors appeared, and after twelve months he petitioned for his discharge. The application was duly advertised, and no opposition being made, was granted. He subsequently acquired some property, and execution was then issued in this action. The master in chambers refused to set aside the execution on motion made by the defendant, and his order was reversed by Osler, J.:—Held, affirming the decision of Osler, J., that the want of assets at the time of making the assignment could not be set up on the application as a ground for avoiding the discharge, but was a matter for the consideration of the insolvent court upon the application therefor, and that unless attacked for fraud it was a complete answer to the plaintiff's claim. Held, also, that the plaintiff's claim was one which was barred by the discharge. *Thomas v. Hall*, 6 P. R. 172, and *Parke v. Day*, 24 C. P. 619, commented upon. *Forrester v. Thrasher*, 9 P. R. 383; 2 O. R., Q. B. D. 38.

A final order of discharge obtained by an insolvent upon a deed of composition and discharge confirmed, will be vacated by this court, on bill filed by a creditor, party to the insolvency proceedings, where such discharge has been obtained by a fraudulent concealment of assets. An insolvent firm, on September 16th, 1878, made an assignment under the Insolvent Acts. On October 2nd, 1878, a deed of composition and discharge, under the said Acts, was executed, whereby the said firm covenanted to pay a certain dividend, and on February 28th, 1879, the judge in insolvency made an order for its confirmation, a sworn statement of the assets and liabilities of the firm having been first duly filed by the members thereof. Long afterwards one of the creditors, who had consented, on payment of a certain dividend, to assign his claim to S. as trustee for the insolvent firm, and for the purpose of executing the said deed, though he himself refused to execute it, discovered that C., one of the members of the firm had fraudulently concealed some of his assets, and he filed a bill in this court to have the said deed of composition, and the order confirming the same, declared void as against him:—Held, that the deed and order of confirmation must be vacated as regarded C., and the insolvency proceedings re-opened, so that there might be a due administration of the assets, thus withheld, and the assignment to S. must be prevented from being set up as a bar to such relief. *McGee v. Campbell et al.*, 2 O. R., Chy. D. 130; reversing *S. C.* 28 Chy. 308.

Held, also, (Proudfoot, J., dubitante), inasmuch as the assets fraudulently concealed were C.'s private property and not the property of the partnership, the discharge should only be vacated as to the private estate of C. Per Proudfoot, J., the assignment to S. was invalid, being made

without consideration, or for a consideration, which was no satisfaction, being the payment of a less sum for a greater; but even if it must be taken to have been for value, it was sufficient for the plaintiff to shew that it was entered into under a mistake caused by the insolvent firm, as to the true amount of the assets, whether the firm acted innocently or otherwise. *S. C.* 2 O. R., Chy. D. 130.

It also appeared that among C.'s assets was a certain sum received by him, or to which he had a claim from a certain railway company as compensation for services rendered as temporary acting president:—Held, that C. was bound to return as an asset the portion of the compensation payable for services rendered up to the date of the assignment in insolvency, but not the remainder. *Id.*

The insolvent, nine months before his insolvency, stated to the contestant that he had a surplus of \$40,000. When he failed it appeared that there was a deficiency of about that amount, the difference not being satisfactorily, if at all, accounted for. He did not produce all his books, but it was proved that they were kept in such a manner that they would not shew the true state of his affairs. The cash-book had never been balanced, and no balance sheet was ever made out; bills were discounted which did not appear in any of the books, and goods were transferred from his wholesale to his retail place of business without entry in the books that were kept:—Held, reversing the order of the judge below granting a discharge to the insolvent, 1, that though an insolvent may be guilty of the offence of not fully, clearly, and truly stating the causes of his insolvency, that is no ground for refusing the discharge, even after a conviction for the offence; 2, that the omission to keep any books prevents the judge from granting a discharge, whether the intent be fraudulent or not; but, 3, when they have been kept, it is not essential, on the one hand, that they should be kept in the most approved form, nor are they sufficient, on the other, however carefully kept in some respects, if they fail to exhibit the insolvent's exact position; 4, that under the facts in this case the insolvent was not entitled to his discharge. Liberty to the insolvent to renew the application was given, if he should be so advised on his producing the remainder of his books. *In re Hill*, 7 A. R. 694.

Semble, that if an insolvent obtains the consent of the required number of creditors or the execution of a deed of composition and discharge, he may at once make the application without waiting for the expiration of a year; he is not precluded however, from applying after the expiration of a year, under the 64th section of the Insolvent Act (1875). *Id.*

In order to absolutely disentitle an insolvent to his discharge on the ground of failure to keep proper books of account, where the case is not one of a commercial business, the party opposing the discharge must shew that there were no books; or, if there were, in what respect they were defective. *Re Russell*, 7 A. R. 777.

It is no objection to an application by an insolvent for a discharge under ss. 64 and 65 of the Act, that a previous application under s. 56 to confirm a deed of composition and discharge

had been refused, where it appeared that the ground of refusal was that the deed was not executed by a sufficient number of creditors who had proved claims. *Id.*

Quære, whether an assignee would be justified in reconveying the estate to the insolvent under the directions contained in a deed so insufficiently executed. *Id.*

A post nuptial settlement upon his wife made by an insolvent at a time when he was not aware of his inability to meet his liabilities, and while he had contracts on hand from which he might reasonably have expected to make a profit, though they afterwards proved unsuccessful:—Held, no ground for refusing the insolvent his discharge. *Id.*

Upon his appointment the assignee took an inventory of the property, but owing to the execution of the deed of composition and discharge, afterwards declared inoperative, did not remove it:—Held, not a retention or concealment by the insolvent, so as to disentitle him to his discharge; in such a case the retention and concealment necessary to disentitle an insolvent to his discharge must be wilful and fraudulent. *Id.*

See *Beaty v. Samuel*, 29 Chy. 105, p. 55.

BANKS.

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I. CHEQUES AND PASS BOOKS.

The plaintiff's valuator, one H., filled in the blanks in an application for a loan on statements of one S. who forged the names of J. T. B. and I. B. as applicants, and although H. had never seen the property or the applicants, he certified a valuation to the plaintiffs, who accepted the loan, and signed his name as witness to the signatures of the applicants. Cheques in payment thereof to the order of the supposed borrowers were obtained by S., who forged the names of the payees, endorsed his own name, and received payment of the cheques, which were drawn upon the defendants, through other banks, who presented them to the defendants and received payment in good faith. The fraud was not discovered for some time, during which the cheques were returned to the plaintiffs at the end of the month as paid, and the usual acknowledgment of the correctness of the account was duly signed:—Held, affirming the judgment of the Queen's Bench, 45 Q. B. 214, that the plaintiffs were not estopped from recovering the amount paid on the forged endorsements from the defendants by their agent's negligence, as it did not occur in the transaction itself, and was not the proximate cause of their loss:—Held, also, that the acknowledgment of the plaintiffs of the correctness of the account at the end of the month, was at

most an acknowledgment of the balance on the assumption that the cheques had been paid to the proper parties:—Held, also, that it could not be said that the cheques were made payable to fictitious payees, and were therefore payable to bearer. *Agricultural Savings and Loan Association v. Federal Bank*, 6 A. R. 192.

II. BILLS AND NOTES.

The plaintiff, a customer of the defendants' branch bank at Chatham, handed to the manager there for collection a note made by G. C. to and endorsed by T. C., both of whom lived at Detroit, where the note was made and payable. The Chatham branch stamped above the endorsement of T. C. a special endorsement to themselves, but the Chatham manager without endorsing the note sent it to their Windsor branch for collection—Windsor being their nearest branch for Detroit—without any instructions as to the place of residence of the endorser, who, however, was well known in Detroit. The manager of the Windsor branch endorsed it to the cashier of the First National Bank, their agent there, and sent it to him for collection. Payment having been refused upon presentation they handed it to a notary, who duly protested it, but enclosed the notice for T. C., the endorser, in the envelope containing the notice to the Windsor branch, addressed to the manager of that branch. A clerk in the Windsor branch sent the notice for T. C. to the Chatham branch, which was duly posted at Windsor, but was never received from the Chatham post office, and T. C. the endorser, never received any notice. The Chatham manager received the protest by due course of mail, and could have seen from it in time to rectify the mistake that the notice for T. C. had been addressed to the Windsor agent. The endorser having been sued in Detroit escaped on the ground of want of notice, and, the maker being worthless, the payee sued defendants for neglect with regard to such notice. It appeared that in Detroit it was the custom for the notary to send notices for the endorser to the bank from which the note was received. It was contended for defendants that the branches were for this purpose distinct; that the notice was properly sent to Windsor, and thence to the Chatham branch, whence the note came: and that but for the neglect of the Post Office the notice would have been duly received at Chatham and sent to the endorser. But, Held, that the defendants were liable: that on sending the note to their Windsor agent they should have given proper information as to the residence of the endorser for the guidance of the notary: and that the Chatham branch having notice from the protest, which they should have examined, that the notice for the endorser had been sent to Windsor, they should at once have had a proper notice served in Detroit, which they could have done in time. *Steinhoff v. The Merchants' Bank*, 46 Q. B. 25.

Endorsement of note by bank manager—Sufficiency of. See *Small v. Riddell et al.* 31 C. P. 373.

See *Black v. Strickland*, 3 O. R., Chy. D. 217, p. 80; *Nelles v. The Bank of Montreal*, 22 Chy. 449; 7 A. R. 743, p. 61.

III. DEPOSITS.

One McE., who was the assignee of an insolvent estate, kept the estate account as well as his private account, at the defendants' bank. Certain notes of the estate were deposited by him with defendants for collection, and the proceeds placed to the credit of the estate, which McE., as assignee drew out by cheque, and re-deposited with defendants to his private account, and then used for his own purposes. It did not appear that the bank derived any benefit from the transfer, or that McE. was indebted to them:—Held, that defendants were not liable to repay the amount to the estate. *Clench v. Consolidated Bank of Canada*, 31 C. P. 169.

On 22nd August, 1879, the defendants' account at the Bank of Montreal, where the corporation account was kept, was overdrawn \$1,157.64. A resolution of the council was thereupon passed, authorizing the mayor to borrow from some banking institution a sum not exceeding \$2000, to meet the current liabilities until the taxes were available, and authorizing him and the town clerk to sign the necessary documents therefor, and to affix the corporation seal. On 2nd September a promissory note, in accordance with this resolution, was made, and was discounted at the Bank of Montreal, and the proceeds placed to the defendants' credit. On the 5th September, a similar note was made and discounted at the plaintiffs' bank, where the defendants had kept an account, but which was virtually closed, though there was a small balance still remaining to their credit. The last note was in fact fraudulently procured to be made and discounted by one T., who was the defendants' clerk and treasurer, and who was in default, to cover up his defalcations, but of this the plaintiffs knew nothing. T., as such treasurer, then, chequed out of plaintiffs' bank \$1,656 of this amount, which he deposited to the defendants' credit at the Bank of Montreal, and then paid it out on corporation cheques for authorized corporation purposes:—Held, in an action for money had and received that the plaintiffs were entitled to recover the \$1,656, for that T., though acting fraudulently, had acted in a matter within the scope of his authority, and the defendants had received the benefit of the fraud. *Molsons' Bank v. The Corporation of the town of Brockville*, 31 C. P. 174.

The plaintiffs were sureties to a bank for a debt due by a company, and for which the bank held other notes as collaterals. Under a special agreement made in a prior suit, the receiver in such suit deposited the proceeds of such collaterals in such bank subject to the order of the court. The plaintiffs claimed to apply the proceeds so deposited to reduce the debt of the company, but the bank refused so to apply them without an order of court:—Held, (1) that the bank was constituted a stakeholder of such moneys, and could not so apply them without the sanction of the court: (2) that the bank was not chargeable with interest on the moneys so deposited, even though it might have made a profit on such moneys. *Hutton v. Federal Bank*, 9 P. R. 568.—Hodgins, Master.

IV. PURCHASE OR SALE OF GOODS BY.

By the Banking Act, 34 Vict. c. 5, D., banks are prohibited from buying or selling goods or

merchandise:—Held, therefore, that an action would not lie against an incorporated bank for breach of warranty on the sale of a horse-power machine. *Radford v. The Merchants Bank*, 3 O. R., C. P. D. 529.

V. MISCELLANEOUS CASES.

Liability of bank on guarantee of local agent. See *Dobell et al. v. Ontario Bank et al.*, 3 O. R. Chy. D 299. Since reversed in Appeal, see 20 C. L. J. 144.

Claim of bank under warehouse receipt. See *Smith v. The Merchants' Bank*, 28 Chy. 629, pp. 82, 83.

BARRISTER-AT-LAW.

COUNSEL FEE—See COSTS.

By 37 Vict., c. 20, N. S. (1874), the Lieutenant-Governor of the province of Nova Scotia was authorized to appoint provincial officers under the name of Her Majesty's counsel learned in the law for the province. By 37 Vict., c. 21, N. S., (1874), the Lieutenant-Governor was authorized to grant to any member of the bar a patent of precedence in the courts of the province of Nova Scotia. R., the respondent, was appointed by the Governor General on the 27th December, 1872, under the great seal of Canada, a Queen's Counsel, and by the uniform practice of the court he had precedence over all members of the bar not holding patents prior to his own. By letters patent, dated 26th May, 1876, under the great seal of the province, and signed by the Lieutenant-Governor and provincial secretary, several members of the bar were appointed Queen's counsel for Nova Scotia, and precedence was granted to them as well as to other Queen's counsel appointed by the Governor-General after the 1st of July, 1867. A list of Queen's counsel to whom precedence had been thus given by the Lieutenant-Governor, was published in the Royal Gazette of the 27th May, 1876, and the name of R., the respondent, was included in the list, but it gave precedence and precedence before him to several persons, including appellants, who did not enjoy it before. Upon affidavits disclosing the above and other facts, and on producing the original commission and letters patent, R., on the 3rd January, 1877, obtained a rule nisi to grant him rank and precedence over all Queen's counsel appointed in and for the province of Nova Scotia since the 26th December, 1872, and to set aside, so far as they affected R's precedence, the letters patent, dated the 26th May, 1876. This rule was made absolute by the Supreme Court of Nova Scotia, on the 26th March, 1877, and the decision of that court was in substance as follows:—1. That the letters patent of precedence, issued by the Lieutenant-Governor of Nova Scotia, were not issued under the great seal of the province of Nova Scotia; 2. That 37 Vict., caps. 20, 21, of the Acts of Nova Scotia, were not ultra vires; 3. That s. 2, cap. 21, 37 Vict., was not retrospective in its effect, and that the letters patent of the 26th May, 1876, issued under that Act could not affect the precedence of the respondent. On the argument in appeal before the Supreme Court of Canada the question of the

validity of the great seal of the province of Nova Scotia was declared to have been settled by legislation, 40 Vict., c. 3, D., and 40 Vict., c. 2, N. S. A preliminary objection was raised to the jurisdiction of the court to hear the appeal. Held: 1. That the judgment of the court below was one from which an appeal would lie to the Supreme Court of Canada; (Fournier, J., dissenting.) 2. Per Strong, Fournier and Taschereau, JJ.:—That 37 Vict., c. 21, N. S., has not a retrospective effect, and that the letters patent issued under the authority of that Act could not affect the precedence of the Queen's counsel appointed by the Crown. 3. Per Henry, Taschereau, and Gwynne, JJ.:—That the British North America Act has not invested the legislatures of the provinces with any control over the appointment of Queen's counsel, and as Her Majesty forms no part of the Provincial Legislatures as she does of the Dominion Parliament, no Act of any such Local Legislature can in any manner impair or affect her prerogative right to appoint Queen's counsel in Canada directly or through Her Representative, the Governor-General or vest such prerogative right in the Lieutenant Governors of the provinces; and that 37 Vict., caps. 20 and 21, N. S., are ultra vires and void. 4. Per Strong and Fournier, JJ.:—That as this court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question. *Lenoir v. Ritchie*, 3 S. C. R. 575.

Junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their leaders. *The International Bridge Co. v. The Canada Southern R. W. Co.*, and *The Canada Southern R. W. Co. v. The International Bridge Co.* 7 A. R. 226., but see 28 C. L. J. 355.

As to right of different counsel representing defendants with common defence to cross-examine a witness separately. See *Walker v. McMillan*, 6 S. C. R. 24, p. 97. 765

Practising barrister dealing largely in land transactions, but not shewn to be dependent thereon for his living:—Held not a trader under the Insolvent Act. *Joseph v. Haffner*, 29 Chy. 421.

BASTARD.

A mother some months before her death, consigned her illegitimate child, seven years of age, whose reputed father was dead, to the custody of a protestant institution, she being a Roman Catholic. Immediately before her death she signed a paper expressing her desire to have her child delivered up for nurture to a Roman Catholic institution:—Held, that the court had not power to compel the delivery up of the child, and that the express wish of the mother was no ground for interference. *In re Smith, an Infant*, 8 P. R. 23.—Hagarty.

The plaintiff, as administratrix, sued the defendants, under 44 Vict. c. 22, s. 7, O., for the death of her illegitimate son, a brakeman on the defendants' railway, who was killed by being carried against a bridge not of the height required

by that Act, while on one of their trains passing underneath it. The bridge belonged to another railway company, which had the right to cross the defendants' line in that way, and though the time allowed by the statute for raising the bridge had expired, they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised, the bridge:—Held, that as the Act was intended to give no greater right to recover than Lord Campbell's Act, therefore the plaintiff's relationship to the deceased prevented her recovery. *Gibson v. Midland R. W. Co.*, 2 O. R., Q. B. D. 658.

BATTERY.

See ASSAULT.

BAWDY-HOUSE.

Held, that a conviction under 32-33 Vict. c. 32, s. 2, sub-s. 6, Dom., for being an unlawful (instead of an habitual) frequenter of a house of ill-fame, and which adjudged the payment of costs which is unauthorized by the statute, must be quashed. That section makes the being such habitual frequenter a substantial offence, punishable as in s. 17, and does not merely create a procedure for trial and punishment. *Regina v. Clark*, 2 O. R., Q. B. D. 523.

See also *Regina v. Flint*, 4 O. R. 214.

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Powers of Provincial Legislature as to restricting the hours within which billiard rooms in taverns may be kept open. See *Regina v. Hodge*, 46 Q. B. 141; 7 A. R. 246; 9 App. Cas. 117.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

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2. *Married Women*—See HUSBAND AND WIFE.

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X. DUTIES OF BANKS IN CONNECTION WITH BILLS OR NOTES—See BANKS.

XI. PREMIUM NOTES—See INSURANCE.

II. FORM.

Held, that the note in this case was not a negotiable promissory note, not being made payable absolutely and at all events, but only as collateral security for plaintiff's guarantee. *Sutherland v. Patterson*, 4 O. R., C. P. D. 565.

See *Swaisland v. Davidson et al.*, 3 O. R., 320, p. 75.

III. STAMPS.

The plaintiffs refused to purchase a note from the holder one C., because it was insufficiently stamped, whereupon C. affixed double stamps and transferred it to the plaintiffs, who did not notice that the stamps had not been properly cancelled until some time afterwards, when they at once double stamped it and cancelled the stamps under 42 Vict. c. 17 s. 13 Dom. :—Held, reversing the decision of the County Court, that the plaintiffs, having taken the note in the full belief that it had been properly double stamped by C., who was at the time the holder, were entitled to double stamp it under the above section, upon discovering the defect. *Trout et al. v. Moulton*, 5 A. R. 654.

In an action on a promissory note, which at its making was not stamped, but had been double stamped before action, and after the repeal of the stamp Act by the 45 Vict. c. 1 D., the defendant denied the making of the note. At the trial Wilson, C. J., refused leave to plead insufficient stamping on account of the repeal of the Stamp Act, but the plaintiff was allowed to amend by adding allegations shewing the consideration for the note, and gave judgment for the plaintiff :—Held, that the judgment was right. Per Hagarty, C. J. —The learned Judge was not bound to allow a plea of insufficient stamping to be added by way of amendment, under the circumstances. Per Armour and Cameron, JJ. —The amendment should have been allowed. Per Armour, J. —The note even if unstamped or insufficiently stamped was admissible in evidence of the debt to the plaintiff, the Stamp Act not prohibiting such a use of it, and *McKay v. Grinley*, 30 Q. B. 54, contra, should not be followed. Per Hagarty, C. J., and Cameron, J. —It is necessary, at all

events since the Judicature Act, to plead specially want of stamps. Per Cameron, J. —The unstamped note was in its inception valid, but became invalid by neglect to stamp it. The repeal of the Stamp Act leaves the law where it was before those Acts were passed, and the note being originally a valid transaction is valid. *Caughill v. Clarke*, 3 O. R., Q. B. D. 269.

Defendant having pleaded several distinct defences to an action on a promissory note, the Master in Chambers refused to allow him to add a plea that the note was not duly stamped, holding that under R. S. O. c. 50, sec. 270, such amendment was not compulsory, but a matter of discretion. On appeal, Osler, J., affirmed his decision. *S. C.*, 9 P. R. 471. —Dalton, Master.

The note upon which this action was brought had not been properly stamped, and it was urged that it could not be a payment or satisfaction of one of which it was intended to be a renewal :—Held, that the plaintiff being aware of the objection to the unstamped note, and receiving it in lieu of the paper which he held, could not urge this as an objection, he having declared upon it as a promissory note. *Baillie v. Dickson*, 7 A. R. 759.

Held, that a promissory note before being negotiated could be stamped by the maker on the day of the making thereof, though after it had been signed and indorsed by the payee. *Bank of Ottawa v. McLaughlin*, 8 A. R. 543.

Where the defendant, being sued on a promissory note, alleged that the said note was not duly stamped before the repeal of the Stamp Act, nor until after action brought, although he communicated the fact of that omission to the plaintiffs before he was sued, and the plaintiffs denied that the defendant had so notified them, and alleged that they double stamped the note as soon as they had knowledge of the omission to stamp, which was not till after action brought, and after the repeal of the Stamp Act; and the evidence shewed that when the note came to the plaintiffs' hands it appeared to be properly stamped :—Held, that the defendant could not be allowed, upon his own unsupported testimony, in such a case to escape liability. The onus was on him to establish that the stamp was not duly affixed, and that the omission to duly stamp was so intelligibly communicated to the plaintiffs that it could be said they acquired the knowledge of the defect at the time alleged by him. *Bank of Ottawa v. McMorrow*, 4 O. R., Chy. D. 345.

To cure a defect in stamping by double stamping forthwith was, under the Stamp Act, 42 Vict. c. 17, s. 13, an inherent right existing during the currency of the instrument, and accompanying its possession; and by virtue of the Interpretation Act, 31 Vict. c. 1, ss. 3, 7, sub-s. 36, the same right still exists notwithstanding the repeal of the Stamp Act. *Id.*

IV. ALTERATION.

D. gave C. two promissory notes, payable to C. or bearer, but having endorsed on them contemporaneously with their making, and in the case of one of them on the edge of the paper, the words "the within notes not to be sold," which endorsement the evidence shewed formed part of

the contract between the parties. The notes were transferred to S., with the word "not" in the above endorsement, in the case of one of them erased, and the whole of the said endorsement in the case of the other, in which it was written along the edge, torn off, but without destroying any part of the face of the note:—Held, that whether the words of the above endorsement were underwritten or endorsed was immaterial, they being part of the original contract, and the effect of it was to prevent C. disposing of the notes to a holder for value, so as to preserve to the makers all defences and equities, as against the first holder and volunteers under him, thus qualifying their negotiability. *Swaisland v. Davidson et al.*, 3 O. R., Chy. D. 320.

Held, also, the notes having been altered in a material part, D. was discharged, and S. could not be protected on the ground of any negligence on D.'s part in respect to the note in which the endorsement was written along the edge of the paper, inasmuch as the notes were issued in a perfected shape, and the doctrine of negligence does not apply to such perfected instruments. *Ib.*

It appeared that S. was a private banker; that he had been informed before taking the notes that they were given in purchase of patent rights: that he noticed the erasure in the one of them first purchased, and that he paid much less than the commercial value of them, while they both bore marks of infirmity and indeed of knavery:—Held, S. could not be considered an innocent holder of the notes. *Ib.*

After a promissory note, made by three persons, in these words: "We, either three of us, promise to pay D. P. or bearer," had been transferred to the plaintiff's testator, the payee's name was added to the foot of the note, apparently as maker. It did not appear how it came there, but it was not his signature:—Held, affirming the judgment of the County Court, Morrison, J. A., dissenting, that it was such a material alteration as to vitiate the note; and that this would have been so even if the name had been placed there by the payee or by his authority. *Reid v. Humphrey et al.*, 6 A. R. 403.

Held, also, that prima facie the name was placed there improperly; that it would have lain upon the testator, if alive, to account for the alteration, and his death did not dispense with this requirement. Per Morrison, J. A.—As the name of the payee was forged, it was ineffectual to alter the character of the note, and therefore, did not vitiate it; and in the absence of evidence to shew how the name was added, the presumption would be that, if genuine, it was placed there as an endorsement. *Ib.*

V. PRESENTMENT FOR PAYMENT, PROTEST, AND NOTICE OF DISHONOUR.

The defendants made a joint and several promissory note with one H., as sureties for him, payable to the plaintiff:—Held, affirming the judgment of the County Court, that in default of payment at maturity their liability to pay became absolute; and that it was no defence for them that the plaintiff neglected to present the note for payment, or give notice of non-payment by H., of which they were ignorant, and that believing the note had been paid by H., they

took no steps to recover from him, although he was able to pay, and before they became aware of such non-payment H. had become insolvent. *Wilson v. Brown et al.*, 6 A. R. 87.

In an action upon an overdue promissory note payable at a particular place, it is not necessary to shew that there were not funds at the place named wherewith to retire the bill; all that is necessary in such case, even as against an indorser, is to shew presentment, non-payment, and notice of dishonour. *McDonald v. McArthur*, 8 A. R. 553.

The appellants discounted a note made by P. and endorsed by S. in the Bank of Commerce, S. died, leaving the respondent his executor, who proved the will before the note matured. The note fell due on the 8th May, 1879, and was protested for non-payment, and the bank, being unaware of the death of S., addressed notice of protest to S. at Toronto, where the note was dated, under 37 Vict. c. 47, s. 1 (D). The appellants who knew of S.'s death before maturity of the note, subsequently took up the note from the bank, and, relying upon the notice of dishonour given by the bank, sued the defendant: Held, reversing the judgment of the Court of Appeal, 5 A. R. 458, which affirmed the judgment of the Queen's Bench, 45 Q. B. 32, that the holders of the note sued upon when it matured, not knowing of S.'s death, and having sent him a notice in pursuance of 37 Vict. c. 47, s. 1, gave a good and sufficient notice to bind the defendant, and that the notice so given endured to the benefit of the appellants. *Cosgrave v. Boyle*, 6 S. C. R. 165.

Defendants were maker and endorser respectively of a promissory note for the accommodation of D., who discounted it with the plaintiffs, they having knowledge of the facts. On the maturity of the note plaintiffs handed it to D., who was their solicitor, for protest. D. did not protest or notify defendants of its dishonour, but delivered it to them, adding that he had paid it. About three months after its maturity D. absconded in insolvent circumstances, and after that defendants were for the first time notified of the nonpayment of the note. In an action against defendants on the note they pleaded, on equitable grounds, the above facts, and that by the laches of the plaintiffs they were prevented from obtaining indemnity from D., and that if compelled to pay the note, they would be defrauded out of the amount:—Held, a good defence, and that the defendants were discharged. *Canadian Bank of Commerce v. Green et al.*, 45 Q. B. 81.

A notary at Montreal, Quebec, protested a note upon which the defendant, an attorney practising at Belleville, Ontario, was endorser. The notary could not read the defendant's signature, but made an imitation of it upon the notices and in the superscription of the letter which was addressed to "Belleville P. O.," i.e., Province of Ontario. The defendant was well known at, and constantly received letters from the Belleville Post Office. There was proved to be a Belleville in New Brunswick. Other notes, with defendant's endorsement thereon, had been protested by the same notary. The defendant swore that he had never received the notice; but his clerks, who were accustomed to take his letters from

the post office, were not called. The notice to another endorser, addressed to "Belleville P. O.," was received by him:—Held (Cameron, J., dissenting), that if the imitation of the defendant's signature put upon the notice addressed to Belleville was an exact imitation of defendant's signature upon the note, and such notice was posted at Montreal, it would have been sufficient, whether it reached its destination or not. But, Held (Armour, J., dissenting), that upon the facts in evidence there should be a new trial. Per Armour, J.—The court were justified in inferring that the imitation of defendant's signature in the address was as good as the imitation of it in the protest, and that if it came to the Belleville post office so addressed it would have been delivered to him; and the plaintiff was entitled to the verdict. Per Cameron, J.—The illegibility of the address made the notice insufficient. *Baillie v. Dickson*, 46 Q. B. 167. See next case.

Where the holder of a note employs a notary to protest the same at maturity, it is his duty to give the notary all the information that he is possessed of as to the names and residences of the indorsers. Therefore, where the signature of an endorser was so peculiar that no one unacquainted with it could decypher it, although the holder of the note was well acquainted with the signature, and aware of the party's residence, both of which he omitted to communicate to the notary, who when protesting the note made, or as near as might be, a fac simile of the signature, and so addressed the notice of dishonour to "Belleville, P. O.," but the endorser swore that the notice never reached him, though resident in Belleville:—Held, (affirming the finding of Cameron, J.,) that the endorser was discharged. *S. C.*, 7 A. R. 759.

The endorser, a married woman, died intestate during the currency of a note which she had endorsed as surety for her husband, and notice of protest was sent to "James Bell, executor of the last will and testament of M. A. Bell, Perth," and received by the husband, who resided with his children in the house which his deceased wife had occupied. No letters of administration had been granted:—Held, that the notice was sufficient. *Merchants' Bank v. Bell*, 29 Chy. 413.

See *Steinhoff v. The Merchants' Bank*, 46 Q. B. 25, p. 68.

VI. ACCEPTOR AND MAKER.

Personal liability of president of a railway company on an acceptance of a bill of exchange. See *Madden v. Cox*, 5 A. R. 473.

Power of husband to sign notes. Evidence of authority from wife. See *Cooper et al. v. Blacklock*, 5 A. R. 535.

Per Burton, J. A., where an action is brought against the two makers of a joint and several note if it fail against one it must fail as to both. *Horner v. Kerr et al.*, 6 A. R. 30.

VII. DRAWER AND ENDORSER.

Held that a third person holding a note for the benefit of one joint endorser, cannot maintain a joint action against the co-endorsers under R. S. O. c. 116, ss. 2, 3, as endorsers for the full

amount of the note, but must sue each separately in a special action for his share of the contribution:—Held, also, that the Act does not refer to partnership transactions. *Small v. Riddell et al.*, 31 C. P. 373.

Quære, whether the endorsement as made by the manager, was sufficient. *Id.*

See *Canadian Bank of Commerce v. Green et al.*, 45 Q. B., 81, p. 76; *Cross v. Currie et al.*, 5 A. R. 31, p. 81; *Jenks et al. v. Doran*, 5 A. R. 558, p. 58; *Small v. Riddell, et al.*, 31 C. P. 373, p. 82.

VIII. ACTIONS ON.

1. At what Time.

The bill of exchange in this action fell due on 1st December, 1875, and the writ issued on 1st December, 1881:—Held (Cameron, J., dissenting), that the statute began to run on the 2nd December, 1875, and therefore this action was commenced in time. *Sinclair v. Robson*, 16 Q. B. 211, remarked upon. *Edgar v. Magee*, 1 O. R., Q. B. D. 287.

Per Armour, J.—Though the holder of a bill may put himself in a position to commence his action on the day the bill falls due by demanding, and being refused payment, he is not bound to do so; and if he does not, the acceptor has the whole of the day of maturity on which to pay the bill, and the statute does not commence to run until the day after. Quære, whether, even in case of such demand and refusal, the statute will begin to run on that day. *Id.*

Per Cameron, J.—Inasmuch as by C. S. U. C. c. 42 s. 15, the bill might have been protested at any time after three o'clock, on the day it fell due it was then overdue, and the action was commenced too late. *Id.*

Held, that the plaintiff, under the facts stated in the report of this case, had established his right to sue upon the bill. *Id.*

2. Pleas.

The C. L. P. Act, R. S. O. c. 50, s. 120, empowers the court or a judge to strike out pleas not merely where they are embarrassing, because confused in terms and so difficult to understand, but where they combine several defences in one plea, or are repetitions of a defence, already pleaded, and may thus be embarrassing or prejudicial to a fair trial. In this case, being an action on promissory notes, the defendant having pleaded total failure of consideration, added other pleas repeating that defence, and setting up besides another agreement, not necessarily connected with the notes, and so stated as to leave it uncertain whether it was intended as a separate defence or as supporting the other defence:—Held, affirming the judgment of Cameron, J., that such pleas were properly struck out. *Abell v. McLaren*, 31 C. P. 517.

Declaration on a guaranty, by which, in consideration of the plaintiffs accepting three notes of G. for \$751 each, in satisfaction of their claim against G. & Co., defendant did, "to the extent

of \$751, guarantee the payment of the first two of the said notes according to their tenor and effect." Pleas 1. That the notes were payable to plaintiffs' order, and the plaintiffs endorsed the first note to certain persons who held it at maturity, and to whom in the event of G. not paying it, the plaintiffs were liable as endorser: that G. notified defendant of his inability to pay it in full, and defendant paid thereon \$276, of which plaintiffs had notice, and afterwards G. failed to pay the second note, whereupon defendant paid the plaintiffs \$476, being the balance of the sum of \$751 guaranteed by defendant. 2. That the first two notes, to the amount of \$1,276, were paid to plaintiffs as they became due, whereby defendant's guarantee was satisfied:—Held, on demurrer, pleas bad; for, as to the first, defendant was not liable to the plaintiffs' endorsees, and no express or implied request by the plaintiffs to pay was shewn; and as to the second, the guaranty was not satisfied by the payment by G. of \$751. *Crathern et al. v. Bell*, 45 Q. B. 473.

A promissory note made by the defendant had been held by the Consolidated Bank, and after its maturity, the defendant transferred certain timber limits to the bank as collateral security for the payment of the note, which limits the bank sold. The plaintiffs became holders of the note for value after dishonour, and after the timber limits transaction, and brought this action upon the note. A counter-claim against the plaintiffs and the bank by the defendant, setting up that the bank has sold the timber limits without authority and for an insufficient price, and were thereby guilty of a breach of trust, and claiming that the defendant should be permitted to set off so much of his claim therefor against the bank as would satisfy the balance claimed upon the note, was held bad, and struck out, as not being properly a counter claim. Per *Cameron, J.*, unless required by the clear legal rights of the defendant for his protection against the plaintiffs action, counter claims are not to be favoured. *Canadian Securities Co. v. Prentice*, 9 P. R. 324.—*Dalton, Master—Cameron*.

See *Merchants Bank v. Robinson*, 8 P. R. 117, p. 80.

IX. DEFENCES TO ACTIONS.

1. Plaintiff not the Holder.

The possession of bills of exchange by the endorser after he has specially endorsed them, is *prima facie* evidence that he is the owner of them, and that they have been returned to him, and taken up in due course of time upon their dishonour, although there be no re-endorsement; so that by the possession he is remitted to his original rights. In July, 1877, W. drew a bill of exchange on the defendants, payable to his own order, and the latter accepted it. The bill was first specially endorsed to the Bank of O., which specially endorsed it for collection, to the Bank of C. It was dishonoured and protested, and came again into the hands of the Bank of O., which returned it to W. on or before December, 1877. Afterwards, but how did not appear, it got back into the hands of the Bank of O. In 1881 the plaintiff, who was W.'s agent, got it from the bank of O., along with other papers of W., and W., in November, 1881,

endorsed it to the order of the plaintiff, who now sued the acceptors. When produced the bill appeared with all the special endorsements struck out, leaving only the signature of W., to the first special endorsement, and with the last endorsement to the order of the plaintiff. There was no re-endorsement from the Bank of O. to W. or to the plaintiff:—Held (reversing the decision of *Ferguson, J.*, who had nonsuited the plaintiff), that in the absence of other evidence it was to be inferred that W., had satisfied any claim of the Bank of O., and had thereby procured or had the right to make the cancellation of previous special endorsements. *Callow v. Lawrence*, 3 M. & S. 95, cited and followed. *Black v. Strickland et al.*, 3 O. R., Chy. D. 217.

2. Consideration as a ground of Defence.

(a) Accommodation or want of Consideration.

Declaration upon a promissory note. Third plea—"That the defendant made the said note with and for the accommodation of one W. C., at the request of the plaintiffs, in respect of a pre-existing debt, then due to the plaintiffs by the said W. C. alone, and the said note was drawn payable on demand, with interest at 10 per cent., and except as aforesaid there was never any value or consideration for the making or payment of the said note by the defendant." Fourth plea—On equitable grounds. That the defendant made the note jointly and severally with W. C. for his accommodation, and as his surety only, to secure a debt due to the plaintiffs, and that after the note became due the plaintiff gave W. C. an extension of time for the payment of the note:—Held, that the third plea was good, for it shewed that no extension of time had been given, and therefore that there was no consideration; and that the fourth was not an equitable plea and must be amended by striking out the words: "Upon equitable grounds," and the jury notice served with it allowed to stand. *Merchants Bank v. Robinson*, 8 P. R. 117.—*Dalton, Q. C.*

The defendants made a note for \$200, to one M. to assist M. in retiring paper in which defendants were interested. M. discounted his own note for \$200 with the plaintiffs, depositing with them the defendants' note as collateral. When M.'s note fell due, the defendants' note being then overdue, he paid \$25 and gave a renewal for \$175, leaving defendants' note with the plaintiffs. Per *Wilson, C. J.*—Defendants' note was not an accommodation note; but assuming it to be so:—Held, that the proper inference from the evidence was that it was transferred to the plaintiffs as security for the debt represented by M.'s note, not for that note specially; and that the defendants remained liable. *The Canadian Bank of Commerce v. Woodward et al.*, 8 A. R. 347.

A married woman signed a note in blank, and gave it to her son "to be used as he liked." He filled it up for \$1,200, signed it, and transferred it to the plaintiff, who was not made aware of the circumstances under which it had been signed. It was renewed twice without the married woman's name, the original note remaining in the plaintiff's hands:—Held, (reversing the judgment of the court below), that the married woman was a surety in respect of the note for

her son ; and that the authority to the son as to using the note did not extend to keeping it afloat after maturity without her knowledge ; and that she had been discharged by the extension of the time of payment. *Devanney v. Brownlee et al.*, 8 A. R. 355.

(b) *Fraud and Illegal Consideration.*

The defendant was arrested on the charge of embezzling fines which he had received as a Justice of the Peace on the information of the reeve of the township claiming the fines, who took the proceedings with a view to force the defendant into a settlement. He was brought before a justice and committed for trial, and while under arrest pressure was brought to bear on him to compromise by giving security to procure his release, and the plaintiff, who proposed to act on his behalf, gave a note to the township for the amount claimed and induced the defendant to give him a note for the amount, endorsed by his wife. The note included the amount of the fines, and also expenses incurred by the township in an investigation of the defendant's alleged default, to which the latter was not a party. The defendant was then brought before the deputy county judge, but no evidence was offered, and it was stated that the affair had been settled, and that the charge would not be proceeded with, whereupon the defendant was discharged. The plaintiff now sought to recover upon the defendant's note :—Held, that the consideration therefor being the stifling of a prosecution for felony was illegal, and rendered the note void, and that the plaintiff was in no better position than the township would have been had they taken the note. *Bell v. Riddell et ux.*, 2 O. R., Q. B. D. 25.

B. endorsed a promissory note made by C. for the purpose of retiring another similar note which he had previously endorsed for C.'s accommodation, and gave it to C. Instead of retiring this note, however, C. handed it to the plaintiff in payment of a debt, who took it in good faith, but made no inquiry respecting C.'s title to the note or his authority so to deal with it :—Held, affirming the judgment of the Queen's Bench, 43 Q. B. 599, that the plaintiff was entitled to recover against B. *Cross v. Currie et al.*, 5 A. R. 31.

J., an infant, gave to M. a promissory note for the purchase money of a buggy, endorsed by his father, who was of unsound mind, and unable to understand what he was doing. The father received no consideration, and M. was not aware of his condition :—Held, on appeal from the master at Woodstock, affirming his decision, that the father's estate was not liable. *Re James*, 9 P. R. 88.—Boyd.

(c) *Partial failure of Consideration.*

The defendant agreed with the plaintiff that whatever goods P. should order of the plaintiff he would become surety for. P. sent a written order to the plaintiff, who in addition to the goods ordered, sent others, and the whole consignment was invoiced at prices higher than those quoted by the plaintiff and than those

at which P. had ordered some of the goods. Without disclosing these facts to the defendant, but in perfect good faith, the plaintiff presented a bill of exchange upon P. for signature by the defendant, who signed the same supposing that it was for the price of the goods ordered. P. accepted the bill and kept the goods. But the Court of Appeal reversing the judgment of the Queen's Bench, 45 Q. B. 386 :—Held, that the defendant was liable to the extent of the goods ordered, and that the consideration for the bill failed as to the excess only. *Barber v. Morton*, 7 A. R. 114.

3. *Payment.*

A promissory note for \$6,200, made by the president and secretary of a syndicate formed for completing the Hamilton and Dundas street railway, in favour of O., S., and the defendants, was endorsed by them to the Bank of Commerce or order. On the day the note fell due O. and S. respectively paid the same, O. paying \$2,000 and S. \$4,200, the remaining sum due thereon, S. at the time directing the bank agent to endorse it to the plaintiff, who it appeared gave no value for it. The agent endorsed it as follows : "Pay to J. S., " the plaintiff "or order. D. Hughes Charles, manager." The plaintiff thereupon sued the defendants as endorers :—Held, that the plaintiff could not recover, for the evidence shewed that S., by his payment intended to satisfy the note, which being made for a purpose directly relating to and not collateral to the partnership of which S. and defendants were partners, S. could not recover against defendants thereon, and as the plaintiff was found to have only the same right as S., neither could he recover. *Small v. Riddell et al.*, 31 C. P. 373.

The defendants discounted at a bank a promissory note which A. had given them, and on maturity it was paid to the bank out of A.'s moneys within thirty days of his insolvency. In an action by the assignee to recover the amount from the defendants as being a payment within s. 134 of the Insolvent Act of 1875 :—Held, reversing the decision of the County Court, that they were not liable, as the payment was not made to them, but to the bank, who were the actual creditors. *Miller v. Harvey*, 6 A. R. 203.

4 *Other Defences.*

See *Wilson v. Brown et al.*, 6 A. R. 87, p. 76 ; *Canadian Securities Co. v. Prentice*, 9 P. R. 324 p. 79.

See, also, IV p. 74.

BILLS OF LADING AND WAREHOUSE RECEIPTS.

By the Act 34 Vict. c. 5, D., it is not necessary to the validity of the claim of a bank under a warehouse receipt, that the receipt should reach the hands of the bank by endorsement ; the bank itself may make the deposit, and receive from the warehouseman the receipt. *Smith v. The Merchants' Bank*, 28 Chy. 629.

A bank had discounted for a trading firm, on the understanding that a quantity of coal purchased in the United States by the firm should be consigned to the bank, and that the bank would transfer to the firm the bills of lading, and should receive from one of the members of the partnership his receipt as a wharfinger and warehouseman for the coal as having been deposited by the bank, which was accordingly done. The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvents and filed a bill impeaching the validity of the receipt. It appeared that the insolvents had mixed the coal with other coal, and had sold some of it, and that all the coal in the premises was not sufficient to answer the quantity comprised in the receipt. Under these circumstances it was—Held, that the bank had a right as against the assignee—as it would have had against the insolvents—to hold all the coal in store of the description named in the receipt, and also to payment for any such coal as might have been sold by the plaintiff. *Ib.*

The provisions of the 34 Vict. c. 5, Dom., as to warehouse receipts do not invade the functions of the Provincial Legislature by an interference with "property and civil rights" in the province. *Ib.*

[The decision in this case was reversed by 8 A. R. 15, but the decision of the Court of Appeal has since been reversed by the Supreme Court; see 20 C. L. J. 66].

The N. & N. W. Railway Co. and the G. W. Railway Co., shipped on the plaintiff's vessel a quantity of wheat from Hamilton to Kingston, consigned to the Molsons Bank in care of the defendants. The bills of lading contained the following provision: "All deficiency in cargo to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee." The quantity described in the bills of lading was 15,338 10-60ths bushels, while the actual quantity shipped was 15,838 10-60ths bushels and the discrepancy was shewn to have occurred by the omission by mistake to include a draft of 500 bushels, in making up the statement of the quantity shipped. The plaintiff, the carrier, claimed that he was entitled, for his own use, to the 500 bushels so shipped in excess:—Held, that the provision in the bill of lading did not give it to him, and that no custom or usage was proved, giving it such meaning. The defendants who had accounted for such excess to the shipper, were therefore held not liable to the plaintiff. *Murton v. The Kingston and Montreal Forwarding Co.*, 32 C. P. 366.

The plaintiff, consignor, consigned butter to his co-plaintiffs, consignees, in England, and shipped it by the defendant companies under a contract with the defendant Despatch Co., on through bills of lading, making it deliverable to order or assigns, and endorsed by the plaintiff to his co-plaintiffs, his vendees, in England, at a through rate paid to the Despatch Co., and apportioned among them and the other two defendant companies by agreement. The butter was carried by the defendants, the Great Western Railway Co., from London Ont. to New York, and there delivered in good condition on a barge belonging to the defendants, the Great Western Steamship Co. It remained on the

barge through the negligence of the latter company for some days during very hot weather, whereby it was damaged, and it was in that condition received by the consignees. By clause 8 of the bill of lading it was stipulated that "the consignees, or party applying for the goods, are to see that they get their right marks and numbers, and after the lighterman, or wharfinger, or party applying for the goods, has signed for the same, the ship is to be discharged from all responsibility for mis-delivery or non-delivery, and from all claims under this bill of lading." Osler, J., who tried the case, found in favour of the plaintiffs, and gave a general verdict against all the defendants:—Held, per Hagarty, C. J., affirming the decision of Osler, J., that the condition of the bill of lading should, notwithstanding the general words at the conclusion, be restricted in its application to cases arising from mis-delivery or non-delivery, and did not relieve the defendants, the steamship Co. from liability for actual negligence, but that the railway company were not liable. Per Cameron J. The condition in the bill of lading, by its concluding general terms, absolved the defendants from liability for the negligence complained of. *Hately et al. v. Merchants' Despatch Co. et al.*, 4 O. R., Q. B. D. 723.

BILLS OF SALE AND CHATTEL MORTGAGES.

I. REGISTRATION AND CHANGE OF POSSESSION.

- 1 *Affidavit of Bona Fides*, 84.
- 2 *Registration*, 86.
- 3 *Change of Possession*, 86.
- 4 *Re-filing*, 88.

II. DESCRIPTION OF GOODS, 88.

III. CONSIDERATION AND BONA FIDES, 89.

IV. RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE, AND THOSE CLAIMING UNDER THEM, 90.

V. WHO MAY IMPEACH, 93.

VI. FRAUD AND FRAUDULENT PREFERENCES— See FRAUDULENT CONVEYANCES.

VII. MORTGAGE OF SHIPS—See SHIPS.

I. REGISTRATION AND CHANGE OF POSSESSION.

1 *Affidavit of Bona Fides*.

The affidavit of bona fides in a chattel mortgage purported to be sworn before "T. B. F.," without any addition. The affidavit of execution was sworn before the same commissioner, his name being followed by the words, "A Commissioner in B. R. &c."—Held, no objection to the affidavit of bona fides. *Hamilton v. Harrison*, 46 Q. B. 127.

The affidavit annexed to a chattel mortgage omitted the words, "or accruing due," after those "so justly due:—Held, that the debt might be stated as due when it really was due, and that it need not be necessarily stated as either due or accruing. *Farlinger v. McDonald*, 45 Q. B. 233.

The affidavit stated that the mortgage was not granted for the purpose of protecting the goods and chattels against the creditors of the two mortgagors, naming them, or preventing the creditors of the said mortgagor from obtaining payment for any claim against him, the said mortgagor:—Held, sufficient, for that the word mortgagor would mean each of the mortgagors previously mentioned. *Ib.*

The omission of the word “him,” at the conclusion of the affidavit of bona fides registered with a chattel mortgage, has the effect of destroying the security as against an execution creditor who has seized while the goods remained in statu quo, but does not impair the instrument as between the parties. *Davis v. Wickson et al.*, 1 O. R., Chy. D. 369.

B., the customer of a bank, executed a chattel mortgage on his household effects, by way of collateral security, in favour of the bank, which was allowed to run into default, whereupon the mortgagees proceeded to a sale, and appointed W., their bailiff, for that purpose, who had the property appraised and sold it to the plaintiff, a creditor of B., by private sale for \$900; and executed a bill of sale thereof. The plaintiff, in his evidence, swore that B. owed him about \$1,000, and he thought there was ample security for the \$900 and also additional security for B.'s indebtedness to himself, and that the goods seemed to be worth about \$5,000; and the plaintiff, without disturbing in any way the possession of B., rented the property to him, and he remained, as he had theretofore been, in possession. In order effectually to carry out the proposed arrangement with B., the bank by special power appointed their local manager agent to accept the chattel mortgage and as such agent to make the affidavits required to be made by mortgagees:—Held (1) (reversing the judgment below) that it need not appear on the affidavit, or the mortgage, or the papers filed therewith, that the agent was aware of the circumstances connected with such mortgage. *Carlisle v. Tail*, 7 A. R. 10; 32 C. P. 43.

In November, 1881, a chattel mortgage was made to secure the plaintiff as endorser of a promissory note of the mortgagor, dated 4th October, 1881, at two months. A recital in the instrument stated that it had been given “as security to the mortgagee against his endorsement of said note, or any renewal thereof that shall not extend the liability of the mortgagee beyond one year from the date thereof; and against any loss that may be sustained by him by reason of such endorsement of said note, or any renewal thereof.” The affidavit stated it was made “for the express purpose of securing the mortgagee against the payment of such his liability for the said mortgagor by reason of the promissory note therein recited or any future note or notes which he may endorse for the accommodation of the mortgagor, whether as renewals of the said note or otherwise:”—Held, (reversing the judgment of the court below,) that as the mortgage itself was good, and the affidavit covered all that is required by the Act, that part of the affidavit from “or any future note” to the end was unnecessary, and could not vitiate the security. *Keough v. Price*, 27 C. P. 309, remarked upon. *Driscoll v. Green et al.*, 8 A. R. 366.

It is sufficient if one of several mortgagees makes the affidavit required by R. S. O., c. 119, s. 2; *Tidey v. Craib*, 4 O. R., Chy. D. 696.

2 Registration.

Where the goods forming the subject of a chattel mortgage are in bond, it is not necessary that the mortgage should be registered. *May v. The Security Loan and Savings Co.*, 45 Q. B. 106.

A chattel mortgage was duly executed on the 12th of July, and filed on the 18th, the 17th having been Sunday:—Held, affirming the judgment of the County Court, that such registration was too late, the Act R. S. O. c. 119, requiring the same to be effected within five days from the execution of the instrument; that Sunday counted as one of such five days, and that Rule 457, O. J. Act did not apply. *McLean v. Pinkerton*, 7 A. R. 490.

The mortgage, besides being a security for \$1,400 actually advanced, provided that it should also be a security for further advances, if necessary, of goods and merchandize to enable the mortgagor “to carry on business,”—not “to enter into and carry on” as in the statute,—which should “be re-paid on demand at any time within one year from the date hereof, or such other time as the parties may agree thereto”:—Held, that the omission of the words “to enter into” could not render it unnecessary to register the mortgage, as regarded the \$1,400. *Quære*, per Wilson, C.J., whether the clause for future advances was not void as enabling payment to be delayed beyond the year. *Ib.*

M. agreed to manufacture and furnish to the joint account of himself and the plaintiff a quantity of staves to be loaded in cars at a railway station by a day named. By the terms of the agreement the staves were to be considered at all times, whether marked or not, the property of the plaintiff as security for advances:—Held, that under this agreement the staves became the property of the plaintiff as soon as made, and never were the property of M., and that the agreement did not require filing under the Chattel Mortgage Act, and the plaintiff therefore was entitled as against an execution creditor of M. *Kelsey v. Rogers et al.*, 32 C. P. 624.

See also, next sub-head.

3 Change of Possession.

It was alleged that the plaintiff, who was living with his mother, gave the horses in question to her for his board, but no price was fixed for them, and they were kept at the house and used by the plaintiff as before:—Held, that there was no sufficient change of possession to dispense with a registered bill of sale, and the sale was void as against the assignee in insolvency of the plaintiff. *Snarr v. Smith*, 45 Q. B. 156.

The mortgage covered growing crops:—Held (Armour, J., dissenting), that such crops being incapable of delivery or change of possession without change of occupation of the land, the mortgage as to them was not within the Chattel Mortgage Act. *Hamilton v. Harrison*, 46 Q. B. 127.

B., a dry-goods dealer in Ottawa, consigned his stock-in-trade to S. S. & Co., auctioneers in Toronto, for sale, the proceeds to be applied (1st) in payment of \$800 advanced to B. by S. S. & Co., and (2nd) in payment of \$250 advanced by McM. & Co. After the goods had reached the warehouse of S. S. & Co., B. gave other orders on the proceeds, which they accepted conditionally. After the sale had been advertised, but before the time appointed for selling, the sheriff levied on the goods under an execution sued out by the defendants who, on ascertaining the nature and amount of S. S. & Co.'s claim, paid the same to them, and the sale by arrangement was allowed to proceed, the amount realized therefrom being paid into the hands of the sheriff, who should hold the same until the rights of all parties were ascertained. The sheriff thereupon caused the several claimants to interplead:—Held, affirming the judgment of the Court below, 31 C. P. 320. *Armour, J.*, dissenting, that the several orders on S. S. & Co. operated as equitable assignments of the goods or their proceeds; that the consignment to S. S. & Co., was as complete and continuous a change of possession as under the circumstances it was possible to effect, and therefore no necessity existed under the Chattel Mortgage Act for registering the orders, if that could be done; and that the defendants having by their payment to S. S. & Co. been subrogated to their rights, were entitled in priority to all the other claimants to rank upon the proceeds for the sum so advanced. *McMaster et al. v. Garland et al.*, 8 A. R. 1.

Where possession is changed it need not be given personally to the creditor, purchaser, or mortgagee; it may equally be given to a trustee or bailee for him; and the debtor may increase the claim of such bailee, or may charge the goods with further sums in favour of other persons. *S. C.*, 31 C. P. 320.

M. carried on a retail business in a village store, on premises known as the "Star House," from a design over the door, but there was nothing to indicate who was the proprietor. He sold the stock in trade to the plaintiff in August, and formally handed over to him the keys, at the same time telling M., his clerk, that he would not require him any longer. The plaintiff gave one key to M., telling him to open the store next morning, which he did, but the plaintiff next day quarrelled with M. and dismissed him, and he then employed M. until the 1st of October to act as salesman, &c., the plaintiff being at the store a good part of the time. The change of business was advertised, and became well known in the neighbourhood, and new books were opened by the plaintiff. The stock was seized on the 2nd October under execution against M. The transaction was found to have been in good faith and for valuable consideration:—Held, that the question of change of possession was one of fact to be determined on the circumstances of each case, and (reversing the decision of *Osler, J.*), that there was here such an actual and continued change of possession as to dispense with the necessity for a bill of sale. *Hagarty, C. J.*, dissenting, and holding that the question being one of fact, and the learned Judge having found as a fact that the change of possession was not actual and continued, his finding should not be disturbed, as it could not be said to be clearly

wrong. *Scribner v. McLaren et al.*, 2 O. R., Q. B. D. 265.

4 Re-filing.

Held, affirming the decision of the County Court, that the subsequent purchasers and mortgagees mentioned in sec. 10 of the Chattel Mortgage Act, R. S. O. c. 119, are those becoming such after the expiration of a year from the filing of the mortgage. Where therefore the mortgage was registered in August, 1878, and the plaintiff purchased the property in March, 1879, and the mortgage was not refiled:—Held, that the plaintiff was not entitled, as against the defendant, who took the property from him in December, 1879. *Hodgins v. Johnston*, 5 A. R. 449.

The plaintiff held a chattel mortgage made by one G., which was dated 9th May, 1879, and filed 13th May. Defendants' mortgage from the same mortgagor was dated in the December following. On the 12th April, 1880, the plaintiff made affidavit of the amount due up to the 10th April, and refiled the mortgage under the R. S. O. c. 119, s. 10. The defendants were landlords of the mortgagor and illegally distrained for rent, whereupon the plaintiff brought trover for goods levied upon by them and contained in his mortgage:—Held, that the defendants were neither creditors nor subsequent purchasers or mortgagees within the statute, and therefore could not object to the mortgage because the affidavit verifying the statement of the amount due was not made within the thirty days next preceding the expiration of the year. Semble, that such affidavit and statement should be made within the thirty days. *Griffin v. McKenzie et ux.*, 46 Q. B. 93.

Kisscock v. Jarvis, 9 C. P. 156, as to the necessity of the renewal of a chattel mortgage from year to year, approved of and followed, notwithstanding the subsequent legislation contained in R. S. O. c. 119. *Beaumont v. Cramp et al.*, 45 Q. B. 355.

Held, (*Patterson, J.A.*, diss.) that as under the circumstances stated the chattel mortgage was satisfied quoad the goods, the mortgage could not properly be re-filed; and notwithstanding the continued possession of the mortgagor (B.) it was not necessary for the plaintiff to file a bill of sale from the bank to himself in order to preserve his rights as against execution creditors of or bona fide purchasers from B., the mortgagor. *Carlisle v. Tait*, 7 A. R. 10.

See *Tidey v. Craib*, 4 O. R. 696, p. 90.

II. DESCRIPTION OF GOODS.

In a bill of sale certain goods were described as "one brown stallion, ten years old; one bay horse, eight years old; one black mare, nine years old":—Held, a sufficient description. *Corneill v. Abell*, 31 C. P. 107.

Semble, that the description of goods as "in bond," means in the customs warehouse, and is a sufficient description as regards locality. *May v. The Security Loan and Savings Co.*, 45 Q. B. 106.

Semble, that a piano on board of a vessel would not pass to a mortgagee under the words "with her boats, guns, ammunition, small arms, and appurtenances." *St. John v. Bullivant*, 45 Q.B. 614.

M. owning parts of lots 13 and 14, in the 2nd concession of Murray, gave a chattel mortgage of certain crops, grain, hay, &c., described as "now being on the premises situate on the north east-half of lot 14 in the 2nd concession, and north half of lot 14 in the said concession of Murray:"—Held, that crops and hay upon lot 13 could not pass. *Grass et al. v. Austin*, 7 A. R. 511.

The goods and chattels were described in a chattel mortgage as follows:—Certain specific articles were first enumerated in the mortgage, and the description then proceeded, "also the stock of gold and silver watches, jewellery, and electro-silver plate, which, at the date hereof, is in the possession of the mortgagor in his said store" (being a certain store of the mortgagor thereinbefore specified). The evidence shewed the electro-plated goods and watches were numbered, and might have been identified thereby:—Held, a sufficient description of the goods mortgaged. *Segsworth v. Meriden Silver Plating Co.*, 3 O. R., Chy. D. 413.

In a deed of assignment for the benefit of creditors, goods and chattels were described as all the stock in trade, goods and chattels, &c., including, among other things, all their stock in trade which they, the assignors, "now have in their store and dwelling in the village of Renfrew."—Held, description insufficient, in that the kind of stock in trade should have been mentioned. The safest course in these cases, in the present uncertain state of the law, is for the assignee to take possession and keep it. *Nolan v. Donnelly et al.*, 4 O. R., C. P. D. 440.

III. CONSIDERATION AND BONA FIDES.

A mortgage to secure the plaintiff as endorser of notes not payable within a year:—Held invalid. *May v. The Security Loan and Savings Co.*, 45 Q. B. 106.

The mortgage shewed the debt in the proviso as only becoming due and payable at a future day, but the consideration was stated to be money acknowledged to be paid for the transfer of the property, and the evidence shewed it was given to secure an overdue debt:—Held, that the mortgage could be upheld, regarding it as given for a present debt to be paid at a future day. *Farlinger v. McDonald*, 45 Q. B. 233.

The consideration in the mortgage was stated as \$1,148; but it appeared in evidence that the amount actually owing was only \$1,030.80. The learned judge at the trial nonsuited the plaintiff, on the ground that the consideration was not truly stated, and that the mortgage was therefore void as against the defendant, an execution creditor:—Held (Armour, J., dissenting), that the nonsuit was wrong, for the erroneous statement of the consideration did not avoid the mortgage as a matter of law, but was a circumstance for the jury to consider when deciding the issue of fraud or no fraud. *Hamilton v. Harrison*, 46 Q. B. 127.

Q. and A. partners, being indebted in a sum of \$1,551.66, gave a chattel mortgage on their stock in trade to the creditor to secure \$2,400; it being verbally agreed that the creditor would make further advances to the extent of \$800; and Q. and A. subsequently made a voluntary assignment for the benefit of their creditors, after which the mortgagee seized the property included in the mortgage, and sold the same, undertaking to hold the proceeds subject to the order of the court, whereupon a creditor, whose claim existed at the date of the mortgage, though he had not recovered judgment, brought the present action on behalf of all the creditors of Q. and A. to have the mortgage declared void, and the proceeds paid to the assignee:—Held, that the mortgage was void, under R. S. O. c. 119, for not stating on its face the true consideration. *Parkes v. St. George et al.*, 2 O. R. Chy. D. 342. This case has been carried to appeal.

Where two mortgagees, the defendants in this action, took a chattel mortgage to themselves, to secure certain moneys, having at the time knowledge of a pre-existing debt from the mortgagor to T., and of a prior, but unrenewed chattel mortgage to T. to secure the same:—Held, that such conduct did not amount to mala fides, and T.'s unrenewed mortgage was void as against them under R. S. O. c. 119. *Tidey v. Craib*, 4 O. R. Chy. D. 696.

Held, also that the fact that as to part of the consideration for their mortgage the defendants had not made an actual advance, but were merely liable on promissory notes, did not invalidate the mortgage, R. S. O. c. 119 not requiring as does the corresponding English Act, that the consideration should be truly expressed. *Ib.*

See *Macfie et al. v. Hunter*, 9 O. R. 149, p. 92.

IV. RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE AND THOSE CLAIMING UNDER THEM.

Held, affirming the decision of the County Court, Burton, J.A., diss., that the assignee of an insolvent mortgagor can, for the benefit of creditors impeach a chattel mortgage for non-compliance with the Chattel Mortgage Act. *Re Barrett, an Insolvent*, 5 A. R. 206.

In trover for goods against an assignee in insolvency:—Held, following the last case that the assignee may object to the absence of a bill of sale on an alleged sale by the insolvent, just as an execution creditor or subsequent purchaser for value may do. *Snarr v. Smith*, 45 Q. B. 156.

The plaintiff gave a chattel mortgage to H. to secure certain money, with a proviso enabling the mortgagee to take possession, and sell in case the goods should be taken in execution by any creditor of the mortgagor. These goods were so taken and the defendant, to whom the mortgage had been assigned by H., took possession and sold under it, for which the plaintiff sued in this action, alleging that H. the mortgagee, verbally agreed to pay these executions which were made part of the money secured:—Held, that defendant as assignee, took subject to such agreement. (which did not vary the terms of the mortgage).

though without notice of it; that the plaintiff was therefore improperly nonsuited. *Martin v. Bearman*, 45 Q. B. 205.

A chattel mortgage which has expired by effluxion of time under R. S. O. c. 119, s. 10, and has not been renewed or refiled, ceases to be valid as against all creditors of the mortgagor then existing; and a sale on default in good faith, made by the mortgagee, with the consent of the mortgagor, though good as between the parties to the mortgage, only passes to the purchaser a title subject to the rights of any creditors who may take steps to follow the goods. Remarks upon the policy of the Chattel Mortgage Act. *Barker v. Leeson*, 1 O. R., Chy. D. 114.

The plaintiff, carrying on the business of a druggist, mortgaged his stock in trade to the defendant; the instrument by which it was effected, stipulating that the defendant should take possession of the stock and premises, to hold for four months in order to secure repayment of money advanced, and power was given to the mortgagee to add new stock so as to keep up the business. Default was made in payment, and thereafter a large amount of stock was added, some of the money being expended by the defendant with the assent of the plaintiff; other money being part of the profits of the business was thus reinvested in new stock; some of the old stock remaining in specie. The matter was referred to the master at Belleville, to take the accounts of the dealings between the parties. Before the master made his report, the plaintiff applied on petition for the appointment of a receiver, on the ground that the mortgage had been paid in full:—Held, (1) that as the new stock belonged to the mortgagee himself and the plaintiff could therefore have no claim upon it, and as the master had not yet found which party was indebted to the other, his finding would not be anticipated by the appointment of a receiver; (2) that although the defendant's right on default, was to sell the original stock en bloc after notice, still the defendant was at liberty to add further capital and stock to the business, but not to the prejudice of the mortgagor so as to improve him out of his estate; and so long as the plaintiff chose to allow the business to go on under the defendant's control, he had the right so to conduct it, subject to being called on to account. *Foster v. Morden*, 29 Chy. 25.

The plaintiff, the holder of a chattel mortgage with a covenant for payment, was not scheduled in proceedings in insolvency under the Act of 1875, but he was aware of the proceedings, and the insolvent obtained a final discharge:—Held, that the debt under the chattel mortgage was not extinguished. *Beaty v. Samuel*, 29 Chy. 105.

Semble, per Wilson, C. J., that the purchaser from the mortgagee under the power of sale contained in the mortgage, leaving the mortgagor in possession, is protected so long as the mortgage under which he bought has the protection given it by registration: but when the term of the mortgage expires the purchaser is no longer protected, unless he takes actual possession, or procures and registers a bill of sale from the mortgagee. *Carlisle v. Tail*, 32 C. P. 43.

An interpleader order had been made, which directed the sheriff to pay over to the claimants

\$1000 and interest, the proceeds of the sale of goods claimed by them under a chattel mortgage, which was not impeached. The order directed an issue as to a second chattel mortgage held by the claimants, the execution creditors contending that it was fraudulent. A. & Co. obtained judgment in a division court against the execution debtors after the date of the order, and moved to vary it by directing that the amount of their execution should be retained by the sheriff out of the \$1,000, until garnishee proceedings against the debtor in the division court, in which the sheriff was garnishee, should be disposed of:—Held, that the moneys in the sheriff's hands belonged to the claimants, the chattel mortgagees, as on a sale of the mortgaged chattels by them as mortgagees: that there being no want of bona fides in the mortgage, no want of formalities in it would make it invalid as between the parties to it, so as to entitle the debtor to claim the money secured by it, or to entitle A. & Co. to claim it under their execution. *Macfie et al. v. Hunter*, 9 P. R. 149.—Cameron.

The plaintiff was mortgagee of certain goods of one F. G., a tenant of his father, the defendant C. G. The landlord on the 17th February, 1883, went to the house of the tenant, and declared that he seized everything for rent. He touched nothing and made no inventory. On 24th February he went again and told the tenant's wife that the property had been seized for rent and to let no one take anything away, when she promised to do her best for him. On 5th March the plaintiff, hearing that the goods were going to be seized for rent, took possession under his mortgage and removed the goods. A bailiff went the next day for taxes in arrear, and the landlord gave him a distress warrant to take goods for rent. The bailiff then took the goods which had been removed, and on the tenants waiving an inventory, advertising, &c., sold them within two days to a nephew of the landlord:—Quære, whether a tenant can waive all statutable formalities as to inventory, &c., as regards the mortgage. *Whimsell v. Giffard et al.*, 3 O. R., Q. B. D. 1.

The chattel mortgage contained no re-demise clause, but did contain a clause that the mortgagee might take the goods if the mortgagor attempted to sell, dispose of, or part with the possession of the goods:—Held, that the mortgagee had the right under the circumstances, to take the goods, although default in payment had not been made. *Ib.*

Where a sheriff seizes goods under writs of execution, and a mortgagee lays claim to them under a chattel mortgage, the fact that he subsequently directs the sheriff to sell under the executions, does not necessarily amount to a waiver of his claim under the mortgage. *Seysworth v. Meriden Silver Plating Co.*, 3 O. R., Chy. D. 413.

H., in consideration of his relieving C. from executions against him, procured from C. and his wife, the plaintiff, a promissory note for the amount thereof, and also a chattel mortgage on the goods of both as collateral security. He discounted the note at a bank; and with the proceeds paid off the executions. Afterwards, but before the maturity of the note, and while it was in the bank's hands, claiming that there was a

breach of the mortgage by the removal of certain goods which was disproved, and refusing to allow the mortgagors to redeem, he took the goods thereunder, and sold them, selling goods, beyond the amount required to satisfy the mortgage, including the plaintiff's own goods to the amount of \$137.50. In an action by the plaintiff to recover the damage thereby sustained, the jury gave \$275:—Held, that the plaintiff was entitled to recover. 1. The note being the principal security, and the chattel mortgage merely collateral, H. could not proceed on the mortgage while the note was thus outstanding. 2. The sale was illegal by reason of the refusal of redemption. 3. Even if the sale was merely irregular in selling for a supposed breach, the plaintiff was entitled to recover the value of the excess of the goods sold, and other damages beyond nominal for her interest in the goods; and the verdict was held not excessive. A removal of goods to justify a seizure under a chattel mortgage must be by the mortgagors or on their behalf, and not a wrongful removal by others. *Cochrane v. Boucher et al.*, 3 O. R., C. P. D. 462.

See also *King v. Duncan*, 29 Chy. 113; *Robins v. Clark et al.*, 45 Q. B. 362; *Brown v. Sweet*, 7 A. R. 725.

V. WHO MAY IMPEACH.

Held, under the circumstances stated in the report of this case, that neither the assignment for the benefit of creditors, nor the sale of the goods disentitled the plaintiff to impeach the mortgage, and he was entitled to the relief claimed. *Parkes v. St. George et al.*, 2 O. R., Chy. D. 342

See *Griffin v. McKenzie et ux.*, 46 Q. B. 93, p. 88.

BOARD OF AUDIT.

See COUNTY ATTORNEY.

BOARDING HOUSE.

Upon the evidence in this case the County Court judge decided that the defendant was not a boarding house keeper within R. S. O. c. 147. The Court of Appeal indicated that it would have decided otherwise. See *Rees v. McKeown*, 7 A. R. 521.

BOND.

I. PARTICULAR BONDS.

1. *Appeal*—See COURT OF APPEAL—PRIVY COUNCIL—SUPREME COURT.
3. *Debentures*—See DEBENTURES.
4. *Railway*—See RAILWAYS AND RAILWAY COMPANIES.

BONUS.

TO RAILWAYS—See RAILWAYS AND RAILWAY COMPANIES.

A municipal corporation may grant a bonus by way of loan to a manufacturing company as the word "bonus" in the Municipal Act, does not necessarily import a gift. See *Scottish American Investment Co. v. The Corporation of the Village of Elora*, 6 A. R. 628.

BOUNDARY.

I. DESCRIPTION OF LAND—See DEED.

II. POSSESSION UNDER MISTAKE IN BOUNDARIES—See LIMITATION OF ACTIONS AND SUITS.

III. BY WATER—See WATER AND WATER COURSES.

BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE.

BRIBERY.

AT ELECTIONS FOR PARLIAMENT—See PARLIAMENT.

Bonus by-laws procured by bribery. See *In re Langdon and The Arthur Junction R. W. Co. and The Corporation of the Township of Arthur*, 45 Q. B. 47.

BRIDGE.

See INTERNATIONAL BRIDGE COMPANY.

BRITISH NORTH AMERICA ACT, 1867.

See CONSTITUTIONAL LAW.

BROKER.

Action against the defendants, stock-brokers at Toronto, for breach of duty in not buying certain stock for the plaintiff. On 25th March, the plaintiff by telegraph instructed defendants to buy the stock at 114 or less, which defendants by letter in reply agreed to do, but said that the telegram was received too late to enable them to act on it that day. On Monday following, the 27th, defendants telegraphed plaintiff that they had cancelled his order in the meantime, as there were unfavourable rumours about the stock, and that they were writing. The plaintiff received this about noon the same day, but did not answer it, waiting for the letter, which he received about five o'clock the following day, the 28th, being to the same effect as the telegram, and asking the plaintiff to repeat the order if he wished defendant to buy for him. The plaintiff on the receipt of the letter wrote, that from defendant's telegram he expected something more tangible and definite than mere general unfavourable impressions and suspicion for not filling his order, and therefore waited for defendants' letter; that he had given a positive order to buy, &c. :—

Held, (1) that the correspondence shewed that the plaintiff ratified or assented to the defendants' course of conduct in disobeying his instructions and exercising their discretion; that the construction of the correspondence was for the court and not for the jury; (2) that at all events no damage was proved, as on the Monday when the plaintiff became aware that defendants had decided not to buy, the stock was still at 114. *Smith v. Forbes et al.*, 32 C. P. 571.

See *Rice et al. v. Gunn et al.*, 4 O. R. 579.

BUILDING CONTRACT.

See WORK AND LABOUR.

BUILDING SOCIETIES.

See CORPORATIONS.

Held, under C. S. U. C. c. 53, s. 40, and 36 Vict. c. 104, s. 9, Dom., that the plaintiffs, a loan and savings society, were empowered to make loans by way of mortgage of real estate to a person not a member thereof, and to take as collateral security therefor the promissory note of a person also not such member. *The Freehold Loan and Savings' Society v. Farrell*, 31 C. P. 453.

By sec. 3 of 37 Vict. c. 50, Dom., borrowers from building societies incorporated under C. S. U. C. c. 53, though not members of the society or signing the rules, are made subject to all rules in force at the time of becoming borrowers, so that by virtue of such rules the society, on a sale of land under a mortgage given by such borrower to the society on default before the expiration of the term fixed by the mortgage, are not restricted to the amount originally advanced with the then accrued interest, but are entitled in addition thereto to discount the future repayments at such rate of interest, and at such terms as the directors determine. The costs of sale and commission thereon were held to be properly chargeable, but not a charge for insurance and survey, or the costs of an action on the covenant, as not coming within the rules. *Green v. Provident Loan Co.*, 31 C. P. 574.

A mortgage was made, pursuant to 9 Vict. c. 90, to the president and treasurer of a building society, their successors and assigns, in trust for the society. The society having subsequently exercised the power of sale, the then president and treasurer, successors of the original mortgagees, conveyed to the purchaser by a deed under seal not being the society's seal. The purchaser sold to G., who objected to the title;—Held, that the lands were conveyed in fee simple to the president and treasurer by the mortgage, and that these officers for the time being had the power to convey in fee, that the power was duly exercised by them, and G. was bound to accept the title. *Re Inglehart and Gagnier*, 29 Chy. 418.

A circular was issued, with the knowledge of the directors of the defendants' company, which, amongst other things, set out that "loans can

be paid at any time and a discharge of the mortgage will be given, the rule of the society being, when this privilege is taken advantage of, to charge three months' additional interest at the same rate at which the loan was made." The plaintiff saw this circular exposed in the office of an appraiser of the company through whom the loan was effected, and was thereby induced to mortgage his land for twenty years, the loan to be repayable on the instalment plan:—Held, (affirming the decree of the court below) that the plaintiff could insist on redeeming his mortgage according to the terms set forth in the circular, such right being sustainable either on the footing of the contract evidenced by the mortgage, the effect of which was to incorporate the rules of the society, while the evidence shewed that what was put forward in the circular as the rule of the society, was one of the rules referred to in the mortgage; or on the footing of a collateral and independent contract. *Hodgins v. The Ontario Loan and Debenure Co.*, 7 A. R. 202.

Held, also, that, although the mortgage recited that the mortgagor was a member of the society, having subscribed for eighty-eight shares of the stock, which the society agreed to pay him in advance on receiving that security therefor, &c., yet without express stipulation to that effect, the mortgagor could not be affected by rules made subsequently to the execution of the mortgage, even if he could under the system under which the operations of the society were carried on he considered a member when he had received the amount of his shares; but that at all events his liability could not be extended beyond the clear words of his contract, which did not point to any but the then existing rules. *Id.*

BUILDINGS.

I. PARTY WALLS, 96.

II. LATERAL SUPPORT.—See LATERAL SUPPORT.

I. PARTY WALLS.

Where the defendant raised the height of a party wall beyond that of the building of the plaintiff, the adjoining owner, with the latter's consent, and subsequently opened a window through the said wall, so raised, so as to overlook the plaintiff's premises:—Held, that by piercing the window defendant had distinctly given notice that he ceased to regard the wall as a party wall; that it was an unauthorized user of the party wall; and the plaintiff was entitled to an injunction to restrain the further continuance of such window. *Sproule v. Stratford*, 1 O. R., Chy. D. 335.

On the 26th September, 1877, S. contracted to erect a proper and legal building for W. on his (W.'s) land, in the city of St. John. Two days after, a by-law of the city of St. John, under the Act of the legislature, 41 Vict. c. 6, "The St. John Building Act, 1877," was passed, prohibiting the erection of buildings such as the one contracted for, and declaring them to be nuisances. By his contract, W. reserved the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail

or execution of the work without avoiding the contract, &c. By the contract it was also declared that W. had engaged B. as superintendent of the erection—his duty being to enforce the conditions of the contract, furnish drawings, &c., make estimates of the amount due, and issue certificate. While W.'s building was in course of erection, the centre wall, having been built on an insufficient foundation, fell, carrying with it the party wall common to W. and McM., his neighbour. On an action by McM. against W. and S. to recover damages for the injury thus sustained, the jury found a verdict for the plaintiff for general damages, \$3,952, and \$1,375 for loss of rent. This latter amount was found separately, in order that the court might reduce it, if not recoverable. On motion to the Supreme Court of New Brunswick for a nonsuit or new trial, the verdict was allowed to stand for \$3,952, the amount of the general damages found by the jury. On appeal to the Supreme Court and cross-appeal by respondent to have verdict stand for the full amount awarded by the jury:—Held, (Gwynne, J., dissenting) that at the time of the injury complained of, the contract for the erection of W.'s building being in contravention of the provisions of a valid by-law of the city of St. John, the defendant W., his contractors and his agent (S.) were all equally responsible for the consequences of the improper building of the illegal wall which caused the injury to McM. charged in the declaration. That the jury, in the absence of any evidence to the contrary, could adopt the actual loss of rent as a fair criterion by which to establish the actual amount of the damage sustained, and therefore the verdict should stand for the full amount claimed and awarded. Per Gwynne, J., dissenting, that W. was not, by the terms of the contract, liable for the injury, and, even if the by-law did make the building a nuisance, the plaintiff could not, under the pleadings in the case, have the benefit of it. *Walker v. McMillan*, 6 S. C. R. 241.

R. (the appellant) brought an action against H. (the respondent) for having erected a brick wall over and upon the upper part of the south wall or cornice of appellant's store, pierced holes, &c. H. pleaded, *inter alia*, special leave and license, and that he had done so for a valuable consideration paid by him, and an equitable rejoinder alleging that plaintiff and those through whom he claimed had notice of the defendant's title to this easement at the time they obtained their conveyances. In 1859 one C., who then owned R.'s property, granted by deed to H. the privilege of piercing the south wall, carrying his stovepipe into the flues, and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building, which was higher than R.'s. R. purchased in 1872 the property from the Bank of Nova Scotia, who got it from one F., to whom C. had conveyed it—all these conveyances being for valuable consideration. The deed from C. to H. was not recorded until 1871, and R.'s solicitor, in searching the title, did not search under C's name after the registry of the deed by which the title passed out of C. in 1862, and did not therefore observe the deed creating the easement in favour of plaintiff. There was evidence, when attention was called to it, that respondent had no separate wall, and the northern wall above appellant's building could be

seen:—Held, that the continuance of illegal burdens on R.'s property since the fee had been acquired by him, were, in law, fresh and distinct trespasses against him, for which he was entitled to recover damages, unless he was bound by the license or grant of C. *Ross v. Hunter*, 7 S. C. R. 289.

BY-LAWS.

I. OF CORPORATIONS GENERALLY—*See CORPORATIONS.*

II. OF MUNICIPAL CORPORATIONS—*See MUNICIPAL CORPORATIONS—WAY.*

III. OF SCHOOL BOARDS—*See PUBLIC SCHOOLS.*

Held, that the validity of a by-law may be questioned on a motion to quash the conviction made under it. *Regina v. Cuthbert*, 45 Q. B. 19.

An applicant is not precluded from moving against a by-law by reason of his having expressed an opinion in its favour before its passage. *In re Peck and the Corporation of the Town of Galt*, 46 Q. B. 211.

By-law held bad on its face, where it was plainly not passed in the public interest but for the benefit of a particular class or individual. *Id.* See, also, *In re Morton and the Corporation of the City of St. Thomas*, 6 A. R. 323.

By-laws must be reasonably clear and unequivocal in their language in order to vary or alter the common law. *Crowe v. Steeper et al.*, 46 Q. B. 87.

The right to pass by-laws necessarily imports a right to repeal the same, but this cannot be done to the prejudice of a party who has obtained rights under such by-laws, without his assent. See *Wright v. The Incorporated Synod of the Diocese of Huron*, 29 Chy. 348, p. 109.

CABS.

Held, that R. S. O. c. 174, s. 415, which provides that the board of commissioners of police shall in cities regulate and license the owners of cabs, &c., used for hire, does not authorize the imposition of a license fee upon the driver of such vehicle; nor does 42 Vict. c. 31, s. 23, which empowers the board to license any trade, calling, business or profession, or the person employed in such trade, &c., give power over persons not within its jurisdiction before so as to authorize the imposition of such a license fee. *Regina v. Reeves*, 1 O. R., Q. B. D. 490.

CALLS.

ON STOCK—*See CORPORATIONS.*

CANADA CENTRAL RAILWAY COMPANY.

See RAILWAYS AND RAILWAY COMPANIES.

CANADA TEMPERANCE ACT, 1878.

Held, that an information which includes the three distinct offences of keeping for sale, selling, and bartering, intoxicating liquors, which are prohibited by sec. 99 of the Canada Temperance Act, 1878, contravenes 32-33 Vict. c. 31, s. 25, which provides that every information shall be for one offence only; but—Held, that such information may be amended by striking out all the offences charged except one; and that such an amendment may be made after the case has been closed and reserved for decision. *Regina v. Bennett*, 1 O. R., Q. B. D. 445.

The defendant swore that he did not sell any intoxicating liquor on the day charged. The recipient of some liquor sold on that day named it in his evidence for the defence, but there was no evidence that it was an intoxicating drink, the evidence for the crown only shewing that it resembled intoxicating liquor:—Held, that there was no reasonable evidence on which to found a conviction for selling intoxicating liquor. *Ib.*

The defendant was convicted of selling intoxicating liquor contrary to the Canada Temperance Act, 1878 upon an information charging him with keeping, selling, bartering and otherwise unlawfully disposing of liquor. He was adjudged to pay a fine of \$50, and \$5.20 costs, and in default of payment and of sufficient distress, he was adjudged to be imprisoned in the common gaol at hard labour. A second record of the conviction, bearing the same date as the first, was filed, differing in some minor points from the first, and omitting the adjudication as to hard labour, and adjudging the payment of \$5.27 costs. The proceedings having been removed by certiorari:—Held, that the first conviction was bad for want of jurisdiction to impose hard labour, which was not authorized by the Act, and that the second was bad in not following the actual adjudication as to costs, which were, as shewn by the magistrate's minute, \$5.20, and not \$5.27. *Regina v. Walsh*, 2 O. R., Q. B. D. 206.

The Canada Temperance Act does not per se make the selling of intoxicating liquor an offence; it is only after the second part of the Act has been brought into force by the proceedings indicated for that purpose in the first part, which proceedings cannot be judicially noticed but must be proved, and in the absence of such proof the magistrate acts without jurisdiction:—Held, therefore, that the convictions were bad, for they did not allege that the Act was in force, nor was it proved otherwise, and therefore, as the jurisdiction of the magistrate did not appear, the writ of certiorari was not taken away by sec. 111 of the Act. *Ib.*

Quære, whether the convictions were not also open to objection on the ground that the information embraced more than one offence, and whether the magistrate having, in this respect, disregarded the express directions of the Act 32-33 Vict. c. 31, s. 25, made applicable by the Canada Temperance Act, he might not be said to have acted without jurisdiction. *Ib.*

Quære, whether sec. 111 takes away the certiorari in all cases, or only in cases coming under sec. 110. *Ib.* [But, see *Regina v. Wallace*, p. 100.]

An information was laid against the defendant on 28th December, for having on 25th December

sold intoxicating liquor, in violation of the Canada Temperance Act, 1878. Upon a search made, intoxicating liquor was found on the premises on 1st January, 1883, in the bar of the hotel. On this evidence the information was amended at the hearing on the 5th January, so as to charge the keeping and not the selling. The defendant was present at the amendment and objected to it, but waived an adjournment and entered upon his defence. The magistrate having found the defendant guilty, drew up a conviction for keeping intoxicating liquor, which was returned to the clerk of the peace, and filed on 17th January, 1883. On the 27th January, 1883, he drew up a second conviction, the same in all respects as the first, with the exception that it was for keeping for sale intoxicating liquor. This was also returned and filed:—Held, that he had power to draw up and return the second conviction, which was warranted by the evidence set out in the report of the case:—Held, also, that there was no variance between the evidence and the information to warrant an amendment, but that the evidence disclosed a new offence, and the amended information became in fact a new one, and the defendant, by his presence and by entering on his defence, had waived the service of a summons upon him:—Held, also, that it was no objection to the conviction that it was for keeping and selling, while the information charged the keeping only. *Regina v. Bennett*, 3 O. R., Q. B. D. 45.

Held, Cameron, J., dissenting, that sec. 111 of the Canada Temperance Act, 1878, 41 Vict. c. 16 D., taking away the right to certiorari, applies to convictions for all offences against the preceding sections of the Act, and does not relate merely to offences against sec. 110. *Regina v. Wallace*, 4 O. R., Q. B. D. 127.

Per Hagarty, C. J., and Armour, J. An erroneous finding on the evidence by the magistrate, which was all that was shewn here, is not such a want of jurisdiction as warrants the issue of a certiorari. *Ib.*

Per Cameron, J. There was on the facts set out below no evidence of the commission of the offence charged in this case, and therefore the magistrate acted without jurisdiction, and a certiorari would lie. *Ib.*

Per Armour, J. The omission of the magistrate to ask the accused whether he had been previously convicted did not deprive him of jurisdiction to receive proof of the prior conviction. *Ib.*

The allegation in the conviction that the offence was committed between the 30th June and the 31st July, was held a sufficiently certain statement of the time. *Ib.*

Constitutionality of the Canada Temperance Act, 1878—See *The Mayor, &c., of the City of Fredericton v. The Queen on the Prosecution of Thomas Barker*, 3 S. C. R. 505; *Russell v. The Queen*, 7 App. Cas. 829.

CAPIAS.

I. WRIT OF—See ARREST.

II. BAIL ON—See BAIL.

III. CA. RE.—See CAPIAS AD RESPONDENDUM.

IV. CA. SA.—See CAPIAS AD SATISFACIENDUM.

V. MALICIOUSLY SUING OUT—See MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

CAPIAS AD RESPONDENDUM.

Where defendant was arrested on a ca. re. and it was doubtful whether the debt was actually due or not, the court refused to discharge the defendant, although the judge who granted the order for the writ would not have done so, if all the facts had been before him. *Willett v. Brown*, 8 P. R. 468.—Hagarty.

See *Butler et al. v. Rosenfeldt—Sweetzer et al. v. Rosenfeldt*, 8 P. R. 175, p. 20; see also *Wheatly v. Sharp*, 8 P. R. 189.

CAPIAS AD SATISFACIENDUM.

When serving a defendant with an order to examine him as a judgment debtor it is not necessary to exhibit the original order unless demanded in order to entitle the plaintiff to move for a ca. sa. against him under R. S. O. c. 50, s. 305. *Imperial Bank v. Dickey*, 8 P. R. 246.—Galt.

Where a judgment debtor disobeyed an order for his examination he was directed to pay the costs of an application for a ca. sa., although the motion was dismissed upon his giving sufficient excuse for his disobedience. *Id.*

Held, that where a ca. sa. had been issued upon the judgment within the year it was not necessary to return and file the same within the year. *Beninger v. Thrasher*, 1 O. R., Q. B. D. 313.

Held, that a divisional court may review the action of a judge in setting aside a writ of ca. sa. and the arrest thereunder, and also his action in making the order to arrest. *Cartwright v. Hinds et al.*, 3 O. R., C. P. D. 384.

Held, on the evidence set out in the report, that the defendant could properly be treated as a resident of this province. *Id.*

Held, that a statement in the affidavit on which the order to arrest was founded, that the defendant had made "an assignment of all his property," without adding for the general benefit of all his creditors, was of itself objectionable, as leading to the belief that the assignment was fraudulent, but apart from this there was sufficient stated to justify the issue of the order. *Id.*

CARRIERS.

I. LIABILITY FOR DAMAGES, 101.

II. MISCELLANEOUS CASES, 103.

III. BY RAILWAYS—See RAILWAYS AND RAILWAY COMPANIES.

I. LIABILITY FOR DAMAGES.

On the 3rd October, the plaintiff chartered the defendant's vessel, the "Erie Belle," to carry

salt from Goderich to Milwaukee, for 75 cents a ton, the effect of the contract being that the vessel was to load and carry within a reasonable time. On the 11th October defendant telegraphed, "Erie Belle" cannot go, will you take steam barge as substitute, answer quick?" Some subsequent correspondence took place, the plaintiff holding the defendant to his contract, and the defendant agreeing to perform it. At this time the plaintiff could have got a vessel at \$1.00, but waited for the defendant's vessel, which was loaded on the 25th November, when the master, fearing bad weather, refused to sail, and it was impossible to charter another vessel. The plaintiff, who had sold the salt in Milwaukee, sent part by rail, and paid his consignee the difference in price between salt which he had to buy and the contract price. The freight by rail was \$3.50 per ton, and 50 cents had to be paid for cartage which would have been unnecessary had the salt gone by defendant's vessel:—Held, on appeal from the arbitrator, that the defendant was not entitled to hold the plaintiff to the damages which he might have recovered had he chartered a vessel at \$1.00 after the telegram of the 11th October, for that telegram, taken in connection with the subsequent correspondence, did not shew an absolute refusal to perform the contract on which the plaintiff was bound to act; but that the plaintiff was entitled to recover the difference in price paid to his consignee, the difference in the freight, and the amount paid for cartage. *McEwan v. Lead*, 46 Q. B. 235.

The defendants contracted with the plaintiff to carry a car-load of clover seed to Liverpool, and gave him a bill of lading therefor. While it was on the way, by a new contract, its destination was changed to London, for delivery to a supposed customer of the plaintiff's and a new bill of lading was given to the plaintiff; but, by a mistake of the defendants, the seed went by a line of steamships to Liverpool, and as soon as the mistake was discovered the defendants notified plaintiff. After great delay, which the learned judge at the trial found to have been caused by the defendants, the seeds reached London and the plaintiff's supposed customer having refused it, it was sold at the reduced price, the market having fallen between the day when the seed should have been delivered in London and the day of sale. The learned judge found a verdict for the plaintiff, and assessed as damages, in addition to freight from Liverpool to London, the difference in market price between the date at which the seed should have arrived in London if it had been shipped by the right line, and the day it arrived there:—Held, (Cameron, J., dissenting,) that the damages were properly assessed, the finding of fact being that the delay was caused by the defendants. Per Cameron, J.—The damages, which were the material result of the breach of contract to carry to London, were what it cost the plaintiff to have the goods taken to London, and a reasonable sum to compensate him for the expense, trouble, and correspondence occasioned by the seed having been sent to a wrong destination; and damages resulting from a fall in the market were not incident to the breach of the contract. *Monteith v. The Merchants' Despatch and Transportation Co.*, 1 O. R., Q. B. D. 47.

The plaintiff, who had purchased a special excursion ticket from Toronto to Niagara and

return on the same day by a steamer of the defendants, and which had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding the plaintiff's fare, and the latter refusing to pay it, the porter by the purser's direction, laid hold of a valise which the plaintiff was carrying, and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured :—Held, Osler, J., dissenting, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act :—Held, also, that the alleged imprisonment of the plaintiff by the purser in his office for non-payment of his fare, not being an act which the defendants themselves could legally have done, the defendants were not liable for it. *Emerson v. The Niagara Navigation Co.*, 2 O. R., C. P. D. 528.

See, *Hatch v. Merchants' Despatch Co.* 4 O. R. 723, p. 84.

II. MISCELLANEOUS CASES.

To an action for the non-delivery of goods delivered to the defendants to be carried from Hamilton to Toronto, the defendants set up that they duly carried and delivered the said goods to the plaintiff at Toronto, but that he did not, as required by one of the terms of the special contract entered into between the parties, give the defendants, within thirty-six hours thereafter, notice of any damage or loss, &c. :—Held, that the defence failed, as the evidence shewed that the goods were never carried or delivered as alleged. *Steele v. The Grand Trunk Railway Co.*, 31 C. P. 260.

A further defence set up was that the plaintiff could not maintain the action, which was in case, because he was not the owner of the goods at the time of the shipment at Hamilton, having sold them to one H. :—Held, that the evidence shewed that he was the owner, for although there appeared to have been a sale the property was not to pass until the delivery of the goods at Toronto. *Id.*

The plaintiff shipped goods from St. Johns, Quebec, to Dundas, Ontario, to be carried from St. Johns to Toronto by the Grand Trunk Railway Co., who delivered them to the Great Western Railway Co., who carried the same to Dundas, where the goods arrived in a damaged state. The plaintiff being in doubt as to which company was liable, there being a separate contract with each, joined both as defendants :—Held, affirming the order of Proudfoot J., who had affirmed the order of Mr. Dalton, Master in Chambers, 9 P. R. 80, that the case came within rule 94 of the Judicature Act, and that the plaintiff had a right to make both companies parties. *Harvey v. Great Western R. W. Co.*, 7 A. R. 715.

The H. & N. W. Railway Co. and the G. W. Railway Co., shipped on the plaintiff's vessel a quantity of wheat from Hamilton to Kingston, consigned to the Molsons Bank in care of the defendants. The bills of lading contained the following provision : "All deficiency in cargo to be paid for by the carrier, and deducted from

the freight, and any excess in the cargo to be paid for to the carrier by the consignee." The quantity described in the bills of lading was 15,338 10-60th bushels, while the actual quantity shipped was 15,338 10-60ths bushels, and the discrepancy was shewn to have occurred by the omission by mistake to include a draft of 500 bushels, in making up the statement of the quantity shipped. The plaintiff, the carrier, claimed that he was entitled, for his own use, to the 500 bushels so shipped in excess :—Held, that the provision in the bill of lading did not give it to him, and that no custom or usage was proved giving it such meaning. The defendants, who had accounted for such excess to the shipper, were therefore held not liable to the plaintiff. *Murton v. The Kingston and Montreal Forwarding Co.*, 32 C. P. 366.

Held, under the circumstance of this case Her Majesty could not be held liable as a common carrier. *Regina v. McFarlane*, 7 S. C. R. 216.

Conveying travellers on Sunday. See *Regina v. Daggett*; *Regina v. Fortier*, 1 O. R., 537.

CERTIORARI.

I. TO BRING UP INFORMATION AND COMMITMENT, 104.

II. TO BRING UP CONVICTIONS.

1 Where it lies, 104.

2 Other Cases, 105.

III. COSTS, 106.

I. TO BRING UP INFORMATION AND COMMITMENT.

Where a defendant has been committed for trial, but afterwards admitted to bail and discharged from custody, a superior court of law has still power to remove the proceedings on certiorari, but in its discretion it will not do so where there is no reason to apprehend that he will not be fairly tried. *Regina v. Adams*, 8 P. R. 462. *Cameron.*

II. TO BRING UP CONVICTIONS.

1 Where it lies.

A certiorari will not lie to remove a conviction under the Liquor License Act, R. S. O. c. 181, s. 48, which has been affirmed and amended on appeal to the sessions, for issuing a license contrary to the said Act, the procedure being regulated by 32-33 Vict. c. 31, s. 71, Dom., as amended by 33 Vict. c. 27, s. 2, Dom. *Regina v. Grainger*, 46 Q. B. 196.

Held, following *Re Bates*, 40 Q. B. 284, that the conviction being for the breach of a by-law the writ of certiorari was not taken away by R. S. O. c. 74. *Regina v. Washington*, 46 Q. B. 221.

Per Armour, J. The Divisional Court of Queen's Bench has power to quash a conviction for an illegal adjudication of punishment, although it has been appealed against and affirmed in respect to such adjudication; and s. 71 of 32 and 33 Vict. c. 31, Dom., does not take away

the certiorari in such a case. *McLellan v. McKinnon*, 1 O. R., Q. B. D. 219.

As to the right of certiorari in convictions under the Canada Temperance Act 1878. See *Regina v. Walsh*, 2 O. R. 206, p. 99; *Regina v. Wallace*, 4 O. R. 127, p. 100.

2 Other Cases.

Held, that a conviction once regularly brought into, and put upon the files of the court, is there for all purposes, and that a defendant may move to quash it, however or at whosever instance it may have been brought there. Where, therefore, on an application for a habeas corpus, under R. S. O. c. 70, a certiorari had issued, and in obedience to it the conviction had been returned, the conviction was quashed on motion, though there had been no notice to the magistrate, or recognizance. *Regina v. Leveque*, 30 Q. B. 509, distinguished. *Regina v. Wehlman*, 45 Q. B. 396.

On a motion to quash a conviction by a justice of the peace which had been appealed to the county judge, an objection that the writ of certiorari was improperly directed to, and returned by, the clerk of the peace and county attorney, instead of the county judge or magistrate, was overruled. *Regina v. Frawley*, 45 Q. B. 227.

In shewing cause to a rule nisi to quash a conviction, objection may be taken to the regularity of the certiorari, and a separate application to supersede it need not be made. Where, therefore, on an application made after notice to the convicting justices for a rule for a certiorari, the rule was refused, and on a subsequent ex parte application on the same material the rule was obtained, it was—Held, affirming the decision of Galt, J., that the notice of the first application would not enure to the benefit of the defendant on his second application, and that the certiorari was irregularly obtained for want of notice to the convicting justices; and a rule to quash the conviction was therefore discharged. Cameron, J., dissented, being of opinion that a substantive motion should be made to quash the writ of certiorari; and that the conviction being before the court under a writ of certiorari un-superseded, the validity of the conviction should be inquired into. *Regina v. McAllan*, 45 Q. B. 402.

Where the recognizance to prosecute a certiorari, returned after allowance of the latter by the convicting justices, together with the conviction, is substantially and clearly bad, and the conviction may possibly be upheld, the allowance of the certiorari may be quashed on the return of the rule nisi to quash the conviction, without a substantive motion for that purpose; but otherwise, where the objection is a trivial one, or the conviction is clearly defective and must inevitably be quashed. *Regina v. Cluff*, 46 Q. B. 565.

Held, that the defendant having had the certiorari directed to the magistrate who had convicted was estopped from objecting that the conviction was in reality made by three justices as appeared from the memorandum of conviction which was signed by them. *Regina v. Smith*, 46 Q. B. 442.

III. COSTS.

As to power to impose costs on private prosecutor where indictment for obstructing highway removed by certiorari at his instance. See *Regina v. Hart*, 45 Q. B. 1.

CHAMPERTY.

It is not a champertous transaction that an association of persons, with which the petitioner was politically allied, agreed to pay the costs of the petition. Even if the agreement were champertous, that would not be a sufficient reason to stay the proceedings on the petition. *North Simcoe Election—Edwards v. Cook*, 1 H. E. C. 617.

CHARITY.

DEVISES TO—See WILL.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CHEQUE.

See BANKS—PAYMENT.

CHILD.

See INFANT.—PARENT AND CHILD.

CHOSE IN ACTION.

I. ASSIGNMENT OF, 106.

II. ATTACHMENT OF DEBTS. See ATTACHMENT OF DEBTS.

III. RELEASE OF. See RELEASE.

IV. EFFECT OF SEQUESTRATION. See SEQUESTRATION.

I. ASSIGNMENT OF.

Declaration, that D., by writing, for valuable consideration, duly assigned to plaintiff the sum of \$500, money due and to become due to D. by defendants, whereof defendants had notice in writing, and at the time of and after said assignment, and after said notice, and before action, defendants were indebted to D. in money sufficient to pay the sum so assigned to plaintiff, &c. :—Held, on demurrer, bad, as not setting forth any fact from which the existence of and promise to pay a debt would be implied by law. *Mitchell v. Goodall*, 44 Q. B. 398, and *Brice v. Baunister*, L. R. 3 Q. B. D. 569, distinguished. *Smith v. The Corporation of Ancaster Township*, 45 Q. B. 86.

The second count stated that D., being largely indebted to plaintiff, and being pressed by him for payment, it was agreed that D. should assign

to plaintiff, to secure part of said debt, \$500 due and to become due to D. by defendants for work done by D. : that D. gave plaintiff an order upon defendants to pay same to plaintiff: that plaintiff notified defendants, who represented to plaintiff that if he would present said order as soon as they had examined said work, which would be before December, 1879, they would pay the \$500 to him: that by said representation plaintiff was prevented from proceeding against D. to recover said \$500: that afterwards and before said December, defendants being liable to pay said sum, and well knowing that plaintiff, relying on said representation, refrained from such proceedings, paid the same over to D., in fraud of plaintiff, and defendants thereafter wrongfully refused to pay same to plaintiff:—Held, good, as disclosing a cause of action upon an assignment of a debt due by defendants to D. for work and labour performed for them by D., and a promise on their part to plaintiff to pay such debt. *Id.*

The plaintiff gave a chattel mortgage to H. to secure certain money, with a proviso enabling the mortgagee to take possession and sell in case the goods should be taken in execution by any creditor of the mortgagor. These goods were so taken, and defendant, to whom the mortgage had been assigned by H., took possession and sold under it, for which the plaintiff sued in this action, alleging that H., the mortgagee, verbally agreed to pay these executions, which were made part of the money secured:—Held, that the defendant, as assignee, took subject to such agreement (which did not vary the terms of the mortgage), though without notice of it; and that the plaintiff therefore was improperly nonsuited. *Martin v. Bearman*, 45 Q. B. 205.

The plaintiff transferred a covenant for the payment of \$4,000, executed by four persons in his favour to the defendant by an absolute assignment, as security for \$2,000; the defendant giving to the plaintiff a separate agreement, to "re-assign" on payment of the loan and interest. On a bill to obtain a re-assignment alleging that such loan had been repaid, the court (Spragge, C.) made a decree for redemption in favour of the plaintiff with costs; the defendant having set up a claim to be entitled to hold the security as absolute purchaser thereof. *Livingston v. Wood*, 27 Chy. 515.

By the terms of a deed of surrender of a lease of a farm to the plaintiff, the lessee W. was to have the privilege of reaping or selling the fall wheat sown, on payment of the rent in advance, or securing it by 1st of October, 1878. On that date arriving without such payment or security, the plaintiff refused to allow its removal, whereupon W. offered to give plaintiff an order for \$299.85, the amount of rent alleged to be due, on the defendant, a commission merchant to whom W. was accustomed to send his grain for sale, if defendant would accept it. The plaintiff accordingly saw defendant, who said he would accept it if it was all right, and drew up an order in plaintiff's favour, which W. signed. The grain was then shipped to defendant, and sold by him. Before the grain arrived, or at all events before it was sold, W. verbally notified defendant not to pay plaintiff, and the defendant requiring written notice, W. wrote defendant stating that he had found plaintiff's account in-

correct, and not to pay plaintiff without further instructions. The defendant thereupon, although expressly notified by the plaintiff's solicitor, that the plaintiff insisted on his right to be paid, paid over the amount of the order to W.:—Held, affirming the judgment of the Queen's Bench, that there was a good equitable assignment, and the plaintiff was therefore entitled to recover. *Mitchell v. Goodall*, 5 A. R. 164; 44 Q. B. 398.

Held, that the usual covenant to insure contained in a mortgage executed under the Act respecting short forms of mortgages operates as an equitable assignment of the insurance when effected. *Greet et al. v. Citizens' Insurance Co.*; *Greet et al. v. Royal Insurance Co.*, 5 A. R. 596; 27 Chy. 121.

Held, that to an action by an assignee of an account for the price of lumber and staves delivered by the assignor to the defendant under two certain contracts therefor, the defendant, under R. S. O. c. 116, ss. 7, 10, and the Judicature Act, ss. 12, 16, and Rule 127, can set up as a defence a claim for damage for the non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior quality of those delivered. Per Osler, J., his right to do so depended wholly upon R. S. O. c. 116, s. 10. In this case the learned judge, at the trial, having refused to entertain the former defence, a new trial was ordered. *The Exchange Bank v. Stinson*, 32 C. P. 158.

A solicitor's claim for costs after a retainer by a Mutual Fire Insurance Company was held to be a debt for which the company was liable, not each branch of the company for its own proportion. The claim being one to B. and D., B. assigned his interest on it to D. upon certain trusts, in which, however, B. had no interest:—Held, that the assignment was absolute and B. entitled to sue: Held, also, that B. having been president of the company when the costs were incurred was no objection. *Duff v. Canadian Mutual Fire Insurance Co.*, 9 P. R. 292.—Proudfoot. Reversed on appeal, *not reported*. 26 R. 560

See, also, *Cowan v. Doolittle*, 46 Q. B. 398.

CHURCH.

- I. CHURCH OF ENGLAND, 108.
- II. TRUSTEES OF RELIGIOUS INSTITUTIONS, 110.
- III. BEQUESTS TO—See WILL.

I. CHURCH OF ENGLAND.

Quære, whether a written license to a parson is necessary in the Diocese of Huron; but if necessary the defendants, having placed the name of the plaintiff on the list of clergymen entitled to a share in the commutation fund, could not afterwards object to the want of such license in a suit instituted by him to enforce payment of his share of such fund. *Wright v. The Incorporated Synod of the Diocese of Huron*, 29 Chy. 348. Reversed in appeal, sec. 20 C. L. J. 146.

The right to pass by-laws necessarily imports a right to repeal the same, but this cannot be done

to the prejudice of a party who has obtained rights under such by-laws, without his assent. Therefore the church society of the diocese of Huron, having received certain moneys, invested the same, and then appointed a committee to consider the future application of the surplus of such fund, and on the report of the committee passed a by-law providing that every clergyman of not less than eight years' active service in the diocese, who was not under ecclesiastical censure, not on the commutation fund, and not in receipt of any salary, should be entitled to \$200 a year. Under such by-law the plaintiff was placed on the list of clergymen entitled to such allowance of \$200 from the surplus interest of such fund, and for some time received it, and defendants, under an Act of the legislature, succeeded the church society:—Held, that the plaintiff had a vested interest in such surplus interest of which he could not be deprived, so long as he came within the provisions of the by-law under which he had been placed on such list; and a subsequent by-law repealing all former by-laws, and declaring that all former grants made in pursuance of prior by-laws should cease, could not affect such vested rights of the plaintiff. *Ib.*

Semhle, that the amendment set out at page 362 of the report, being to strike out a certain canon and substitute another for it, though moved as an amendment to a proposed amendment of such canon, was rather a substantive motion and should have been brought before the synod through the standing committee. *Ib.*

Under the Church Temporalities Act, 3 Vict. c. 74, ss. 2, 3, 6, a vestry capable of electing churchwardens, forming a corporation under the Act, so as to be capable as such of suing or being sued, must be composed of persons holding pews in the church by purchase or lease, or holding sittings therein by lease from the churchwardens. The churchwardens of a church where the sittings were wholly free, were therefore held not liable on a contract made by their predecessors for building the church. *Anderson v. Worters et al.* 32 C. P. 659. See 47 Vict. c. 89.

Where a testator bequeathed unto the incumbent of a certain church all the property she might die possessed of, to be used for the relief of the poor of the church, to be dispensed by the said incumbent, and the churchwardens brought an action, on behalf of themselves and all the members of the congregation, against the executors, to have the estate administered, and for a declaration that the incumbent was entitled to distribute the fund, and an order for payment over of all such sums as should have been distributed by the incumbent among the poor of the church:—Held, on demurrer to the statement of claim, that it was bad in substance, for the churchwardens had no title to maintain the action, since they could not be said to represent the incumbent, to whom the bequest was made, and who was not a member of the congregation in the same sense as the plaintiffs and the other members, and sec. 6 of the Church Temporalities Act, 3 Vict., c. 74, did not authorize them to sue. *McClenaghan v. Grey*, 4 O. R., Chy. D. 329.

Semhle, that the said section gives churchwardens authority in certain specified matters, in which all the members of the church are in-

terested, but here the bequest was only to a particular class, viz., the poor of the church, and therefore not within the section. *Clowes v. Hilliard*, L. R. 4 Ch. D. 413, and *New Westminster Brewing Co. v. Hannah*, 24 W. R. 899 followed, and *Werderman v. Société Générale d'Electricité*, L. R. 19 Ch. D. 246 distinguish-ed. *Ib.*

II. TRUSTEES OF RELIGIOUS INSTITUTIONS.

Held, under the circumstances of this case, that the trustees of a congregation of the Methodist Church had power to borrow money and secure it by chattel mortgage. See *Brown v. Sweet*, 7 A. R. 725.

CLERGY RESERVES MONEYS.

Not within the condition of township treasurer's bond. See *The Corporation of the Township of Oakland v. Proper et al.*, 1 O. R., #330.

CLERK OF THE CROWN AND PLEAS.

See PRACTICE.

CLERK OF THE PEACE.

See COUNTY ATTORNEY.

CLOUD ON TITLE.

See SALE OF LAND.

COBOURG HARBOUR.

Semhle that, "The Commissioners of the Cobourg Town Trust" are a corporation under 22 Vict. c. 72. See *McSherry v. The Commissioners of the Cobourg Town Trust*, 45 Q. B. 240.

Gradual accretion occasioned by harbour works. See *Standly et al. v. Perry et al.*, 3 S. C. R. 356.

COGNOVIT.

Fraudulent preference.—Pressure.—Collusion. See *The Meriden Silver Co. v. Lee et al.*, 2 O. R., 451; *Martin v. McAlpine et al.*, 8 A. R., 675.

COLLATERAL SECURITY.

Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor, the latter is bound to use due diligence in enforcing payment thereof; and if through his default or laches the money secured thereby is lost, it will be charged against the creditor, and deducted from his demand. *Synod v. De Blaquiére*, 27 Chy. 536.

A mortgagee proceeded on the same day to foreclose the property of the mortgagor and his sureties by several bills upon their respective mortgages and to sue at law, in different actions, the same parties on notes held by the plaintiffs, to which the mortgages were collateral;—Held, that only one suit in equity was necessary, as all parties might have been brought before the court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits, and the court would not be deterred from granting relief by the circumstance of a decree being complicated. *Merchants' Bank v. Sparkes*, 28 Chy. 108.

Where R. assigned a certain mortgage to M. to secure payment of two promissory notes of less amount than the mortgage debt, and M. having procured an assignment to himself of a certain judgment against R., the sheriff, pursuant to writs issued under the said judgment, seized the mortgage so assigned, and M. refused to execute a reassignment thereof to R., until not only the amount due on the promissory notes, but also that the balance due under the said mortgage was paid:—Held, that R. was entitled to a reassignment on payment of what was due on the notes only, for the plaintiff's interest in the mortgage was not properly exigible by the sheriff under R. S. O. c. 66. *Ross v. Simpson*, 23 Chy. 552, distinguished. *Rumohr v. Marx*, 3 O. R., Chy. D. 167.

See *The Freehold Loan and Savings Society v. Farrell*, 31 C. P. 453, p. 95; *Hutton v. Federal Bank*, 9 P. R. 568, p. 70; *Cochrane v. Boucher et al.*, 3 O. R. 462, p. 93.

COLLEGE.

See *Marsh v. Huron College*, 27 Chy. 605.

COLLISION.

ON RAILWAYS—See RAILWAYS AND RAILWAY COMPANIES.

COMBINATION.

See PATENT OF INVENTION.

COMMISSION.

I. FOR SERVICES RENDERED.

1. *To Agents*—See PRINCIPAL AND AGENT.

2. *In Administration Suits*—See EXECUTORS AND ADMINISTRATORS.

3. *In Partition Suits*—See PARTITION.

4. *To Trustees*—See TRUSTS AND TRUSTEES.

COMMISSION MERCHANTS.

W., a commission merchant residing at Toledo, Ohio, purchased and shipped a cargo of corn on

the order of C. et al., distillers at Belleville, and drew on them at ten days from date for the price, freight, and insurance. This draft was transferred to a bank in Toledo and the amount of it received by W. from the bank, and the corn having been insured by W. for his own benefit, was shipped by him under a bill of lading, which, together with the policy of insurance, was assigned by him to the same bank. The bank forwarded the draft, policy, and bill of lading to their agents at Belleville, with instructions that the corn was not to be delivered until the draft was paid. The draft was accepted by C. et al., but the cargo arriving at Belleville in a damaged and heated condition, between the dates of the acceptance and the maturity of the said draft, C. et al., refused to receive it and afterwards to pay draft at maturity. Thereupon the bank and W. sold the cargo for behalf of whom it might concern, credited C. et al. with the proceeds on account of draft, and W. filed a bill to recover balance and interest:—Held, reversing the judgment of the court of appeal (*Strong, J.*, dissenting), that the contract was not one of agency, and that the property in the corn remained by the act of W., in himself and his assignees, until after the arrival of the corn at Belleville and payment of the draft; and the damage to the corn having occurred while the property in it continued to be in W. and his assignees, C. et al. should not bear the loss. *Corby et al. v. Williams*, 7 S. C. R. 470; 5 A. R. 626.

COMMISSION OF ENQUIRY.

See COUNTY COURTS.

COMMISSION TO EXAMINE WITNESSES.

See EVIDENCE.

COMMISSIONERS OF POLICE.

Powers as to regulating and licensing owners of cabs, &c. See *Regina v. Reeves*, 1 O. R. 490, p. 98.

COMMITMENT.

I. ARREST—See ARREST.

II. BY ATTACHMENT—See ATTACHMENT OF THE PERSON.

COMMON CARRIERS.

See CARRIERS.

COMMUNITY.

Law of Quebec as to assets belonging to the community existing between husband and wife. See *Pilow v. Brunet*, 5 S. C. R. 318.

COMPANY.

See CORPORATIONS.

COMPENSATION.

I. FOR TAKING LANDS OR EXECUTING WORKS.

1 *By Government*, 113.2 *By Municipalities*—See MUNICIPAL CORPORATIONS.3 *By Railways*—See RAILWAYS AND RAILWAY COMPANIES.

II. FOR IMPROVEMENTS—See IMPROVEMENTS ON LAND.

III. IN SUITS FOR SPECIFIC PERFORMANCE—See SPECIFIC PERFORMANCE.

IV. TO EXECUTORS—See EXECUTORS AND ADMINISTRATORS.

V. TO TRUSTEES—See TRUSTS AND TRUSTEES.

VI. COMMISSION IN LIEU OF COSTS—See EXECUTORS AND ADMINISTRATORS—PARTITION.

I. FOR TAKING LANDS OR EXECUTING WORKS.

1 *By Government*.

The government of Canada, having taken the land of the defendant's testator for the purposes of the Welland Canal, paid into court, under the statute, a sum awarded by the valuers, intended to cover all claims which the owner might have of any kind. The owner was to be at liberty to remove buildings, &c., and on payment of the money to convey free from all other incumbrances, including taxes. The plaintiff was lessee of the property so taken, and claimed compensation for disturbance:—Held, that the plaintiff was entitled to be compensated out of the money paid into court, and that his claim was one which the owner was liable, under stat. 37 Vict. c. 13, s. 1, D., to pay, and which should have been taken into consideration, and which the evidence shewed had been taken into consideration in settling the amount to be paid by the government on taking possession of the lands. *In re the Welland Canal Enlargement—Fitch v. McRae*, 29 Chy. 139.

When land is taken under authority of legislative provisions similar to Revised Statutes of Nova Scotia, 4th Series, c. 36 s. 40 et seq., the compensation money as regards the capacity of married women to deal with it is still to be regarded in equity as land. *Kearney v. Kean*, 3 S. C. R. 332.

See also *Tylee v. The Queen*, 7 S. C. R. 651.

COMPROMISING CRIMINAL OFFENCE.

Promissory note given for the purpose of compromising a criminal offence:—Held void. See *Bell v. Riddell et ux.*, 2 O. R. 25, p. 81.

COMPUTATION OF TIME.

See TIME.

CONFESSION OF JUDGMENT.

See COGNOVIT.

CONFUSION OF PROPERTY.

See *Oliver v. Newhouse*, 32 C. P. 90; *Smith v. The Merchants Bank*, 28 Chy. 629; 8 A. R. 15, *McDonald v. Lane et al.*, 7 S. C. R. 462.

CONSIDERATION.

I. IN BILLS OR NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

II. IN BILLS OF SALE OR CHATTEL MORTGAGES—See BILLS OF SALE AND CHATTEL MORTGAGES.

III. IN CONTRACTS—See CONTRACTS.

IV. INADEQUACY OF—See FRAUD AND MISREPRESENTATION.

V. IN FRAUDULENT CONVEYANCES—See FRAUDULENT CONVEYANCES.

CONSTITUTIONAL LAW.

I. IMPERIAL ENACTMENTS, 114.

II. CONSTITUTIONALITY OF STATUTES.

1. *Generally*, 114.2. *Under British North America Act*, 115.

I. IMPERIAL ENACTMENTS.

Quære, whether the Treating Act 7 Will. III. c. 4 is in force in this province. *Dundas Election—Cook v. Broder*, 1 H. E. C. 205.

Certain charges having been preferred against a county court judge, a commission was issued under the Great Seal of Canada, reciting these facts and the provisions of 22 Geo. III. c. 75 (Imp.) and directing the commissioners to examine into the charges, and for that purpose to summon witnesses and require them to give evidence on oath and produce papers; and to report thereupon. The enquiry proceeded, and a motion was made for a prohibition:—Held, that enquiries under the Imperial Act should be made before the Governor-General in council, and the authority could not be delegated, nor enquiry upon oath authorized by commission:—Held, also, that the commission could not be supported at common law, for it created a court for hearing and enquiring into offences without determining. *Re Squier*, 46 Q. B. 474.

See also *The Georgian Bay Transportation Co. v. Fisher*, 27 Chy. 346; 5 A. R. 383; *Mowat v. McFee*, 5 S. C. R. 66.

II. CONSTITUTIONALITY OF STATUTES.

1. *Generally*.

It would be unconstitutional for the parliament of Canada to pass an Act, rendering Canadian subjects and Canadian corporations subject to such laws as might be passed by the congress of the United States; in fact an abdication of sovereignty inconsistent with the relations of Canada to the empire of which it forms a part. *The International Bridge Co. v. The Canada Southern R. W. Co.*, 28 Chy. 114.

Per Strong and Fournier, JJ.—The Supreme Court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a legislature to pass a statute. *Lenoir v. Ritchie*, 3 S. C. R. 575.

2. Under British North America Act, 1867.

Held, following the case of the commissioners of the Cobourg Town Trust, 22 Chy. 377, that the commissioners of the Toronto harbour were entitled to compensation for their services, and this, whether the harbour belonged to the Dominion or Provincial Government, as in the event of it being found to belong to the Dominion, it must be assumed that the Dominion Government intended the commissioners to be subject to the law of the province in which the trust was to be administered. *Re Toronto Harbour Commissioners*, 28 Chy. 195.

Held, that s. 3 of the 43 Vict. c. 27 O., amending the Assessment Act, was not ultra vires of the legislature. *In re North of Scotland Canadian Mortgage Co.*, 31 C. P. 552.

The provisions of the 34 Vict. c. 5, Dom., as to warehouse receipts do not invade the functions of the provincial legislature by an interference with "property and civil rights" in the province. *Smith v. The Merchants' Bank*, 28 Chy. 629. In the Court of Appeal Armour, J., was of a different opinion, 8 A. R. 15. See this case in Supreme Court not yet reported, 20 C. L. J. 66.

Held, that section 109 of the Dominion Elections Act, 37 Vict. c. 9, which gives a civil remedy by action of debt or information for the recovery of the penalties imposed for the offence of bribery, &c., committed in contravention of s. 92 of the Act, is not ultra vires of the dominion parliament. *Doyle v. Bell*, 32 C. P. 632. This case has been carried to appeal.

Sections 91 and 92 of the B. N. A. Act of 1867 must in regard to the classes of subjects generally described in sec. 91 be read together, and the language of one interpreted and, where necessary, modified by that of the other so as to reconcile the respective powers they contain and give effect to all of them. Each question should be decided as best it can without entering more largely than is necessary upon an interpretation of the statute. *The Citizens Insurance Co. of Canada v. Parsons*; *The Queen Insurance Co. v. Parsons*, 7 App. Cas. 96; 4 S. C. R. 215.

Held that in No. 13 of sec. 92 the words "property and civil rights in the Province" include rights arising from contract, (which are not in express terms included under sec. 91) and are not limited to such rights only as flow from the law, e. g., the status of persons. *Ib.*

In No. 2 of sec. 91 the words "regulation of trade and commerce," include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be general regulation of trade affecting the whole Dominion; but do not include the regulation of the contracts of a particular business or trade, such as the business of fire insurance in a single province, and

therefore do not conflict with the power of property and civil rights conferred by sec. 92, No. 13. *Ib.*

Consequently 39 Vict. c. 24 (Ont.), which deals with policies of insurance entered into or in force in the Province of Ontario for insuring property situate therein against fire and prescribes certain conditions which are to form part of such contracts, is a valid Act, applicable to the contracts of all such insurers in Ontario, including corporations and companies, whatever may be their origin, whether incorporated by British authority or by foreign or colonial authority. *Ib.*

Held, further, that the said Ontario Act is not inconsistent with Dominion Act, 38 Vict. c. 20, which requires all insurance companies, whether incorporated by foreign, dominion, or provincial authority, to obtain a license to be granted only upon compliance with the conditions prescribed by the Act. *Ib.*

The plaintiff, being the holder of a debenture issued by the B. & O. Railway Co. under 23 Vict. c. 109, sued thereon. By the 27 Vict. c. 57, the railway company were authorized to issued preferential bonds, and to execute a mortgage to a trustee to secure payment thereof. The railway, being at the time of confederation a local work, the 31 Vict. c. 44, O., was passed, which recited that the trustee was in possession and about to foreclose the mortgage, and amongst other things, directed that the debentures (therein called ordinary bonds) should be converted into stock at a certain rate on the dollar; and that the holders thereof should have no other claim on the company than for conversion of their debentures into stock. By the 41 Vict. c. 36, D., the B. & O. Railway Co. and the defendant company were amalgamated. The defendants set up that their liability on the debentures in question was extinguished by the 31 Vict. c. 44, O., and that they were ready and willing to take the debentures in exchange for reduced stock thereunder. Third replication that the Act was not binding because it was a private Act, and the plaintiff was not named therein, nor a petitioner thereof, nor were his rights specially taken away thereby. Fourth replication, that the Act was ultra vires, because the debenture was payable in London, England, and was there domiciliated, and the holder resided there at the time of the passing of the Act, beyond the jurisdiction of the Ontario legislature.—Held, on demurrer, third replication bad; for, though the Ontario Act was in the nature of a private Act, it sufficiently referred to the plaintiff by referring to the class of bondholders to which he belonged, and that he was therefore bound thereby.—Held, also, fourth replication bad, for the local legislatures were not restricted by the decree "property and civil rights in the province" to legislation respecting bonds held therein, and that where debts or other obligations are authorized to be contracted under a local Act, passed in relation to a matter within the power of the local legislature, such debts may be dealt with by subsequent Acts of the same legislature, notwithstanding that by a fiction of law they may be domiciled out of the province. *Jones v. Canada Central R. W. Co.*, 46 Q. B. 250.

Held, that the Act 31 Vict. c. 76, D. providing for the taking of evidence to be used in other countries is not ultra vires of the Dominion Par-

liament, for the taking of evidence in one of the provinces for use in foreign tribunals is not a subject which is assigned to the exclusive legislative authority of the province, by s. 92 of the British North America Act, inasmuch as such proceedings are of extra provincial pertinence, and do not relate to civil rights in the province. *Re Wetherell and Jones*, 4 O. R., Chy. D. 713.

Powers of local legislatures to appoint Queen's Counsel.—Letters patent of precedence. See *Le-noir v. Ritchie*, 3 S. C. R. 575.

The Dominion Controverted Elections Act of 1874, 37 Vict., c. 10, D., does not contravene sec. 92, sub-sec. 14 of the British North America Act, 1867. The said sub-section does not relate to election petitions, while sec. 41 of the same Act reserved to the parliament of Canada the power of creating a jurisdiction to determine them. The parliament of Canada has power to commit such jurisdiction to existing provincial courts. Special leave refused to appeal from two concurrent judgments of the courts in Canada, affirming the competency and validity of the said Act of 1874; it appearing that there was no substantial question requiring to be determined, nor any doubt of the soundness of the decisions, nor any reason to apprehend difficulty or disturbance from leaving the decisions untouched. *Valin v. Langlois*, 5 App. Cas. 115; 3 S. C. R. 1.

Held, that 40 Vict. c. 21, establishing a court of maritime jurisdiction for the province of Ontario is intra vires of the Dominion parliament. *The Pictou—Smith v. Keith*, 4 S. C. R. 648.

Pursuant to the Local Courts Act, R. S. O. c. 42, s. 16, et seq., the counties of Middlesex and Lambton were proclaimed by the Lieutenant-Governor as a county court district. By s. 17, in such a district the several county courts, division courts, &c., shall be held by the judges in the district in rotation. By the Division Courts Act, R. S. O. c. 47, s. 19, the division courts shall be presided over by the county court judges in their respective counties. An order for the committal of the defendant was made by the judge of the county court of the county of Lambton, sitting in a division court in the county of Middlesex under the provisions of the Local Courts Act. A motion for a prohibition was made on the ground that that enactment was ultra vires:—Held, Armour, J., dissenting, that the provincial legislature has complete jurisdiction over the division courts, including the appointment of officers to preside over them: that the learned judge acted in the Middlesex division court as one of the persons designated by the legislature to preside over it, and having regard to the enactment in question, solely in its bearing on division courts, it was not ultra vires. *In re Wilson v. McGuire*, 2 O. R., Q. B. D. 118.

Per Armour, J.—Sec. 13 of the Local Courts Act is ultra vires. The provincial legislature having no power to appoint county court judges, neither can authorize the Governor-General to appoint one by order as enacted (the appointment being properly made by letters patent under the great seal), nor can it depute a county court judge to nominate another judge to take his place as enacted. The clear and sole effect of s. 17 is to appoint the judge of each county court in any district judge of all the other

counties which is ultra vires. The provincial legislature has no power to appoint the judges of the division courts; but it has not yet assumed to do so, and in this case the judge acted solely by virtue of being judge of the county court of the county of Lambton, and as such assigned to perform the duties of the judge of the county court of Middlesex, and was therefore acting without authority. *Id.*

The 32 Vict. c. 22, s. 2 (O.); 33 Vict. c. 12, s. 1 (O.), and R. S. O. c. 42, s. 2, assuming to repeal C. S. U. C. c. 14, and C. S. U. C. c. 15, s. 3, and to abolish the court of impeachment for the trial of County Court judges, and regulate their tenure of office are ultra vires the provincial legislature. *Re Squier*, 46 Q. B. 474.

Held, that the legislature of the province of Ontario had power under No. 14, of s. 92, B. N. Act to pass R. S. O. c. 71, providing for the qualification and appointment of justices of the peace. *Regina v. Bennett*, 1 O. R., Q. B. D. 445.

Per Spragge, C. J. O., and Morrison, J. A.—Section 136, of the Insolvent Act, 1875, dealing with matter of procedure incident to the law of bankruptcy and insolvency, was within the jurisdiction of the parliament of Canada to enact. *Peck et al v. Shields et al*, 6 A. R. 639. Affirmed, see 20 C. L. J. 65.

Per Burton, J. A.—Section 136, which gives certain creditors an additional remedy in the provincial courts for the recovery of their debts in full, is ultra vires of the Parliament of Canada; but s. 8, sub-s. 7 of the Insolvent Act of 1864, to the same effect, is still in force, the Parliament of Canada having no power to repeal it. *Id.*

Per Patterson, J. A., it is immaterial whether sec. 136 is ultra vires or not; for if the Parliament of Canada had the power to deal with the subject of that section, it would be binding, but if not, then the same enactment in s. 8, sub-s. 7 of the Act of 1864, is unrepealed and in force. *Id.*

Held, that sec. 24 of 35 Vict. c. 26, Dom., the Patent Act, is not ultra vires of the Dominion Parliament. *Aitchison v. Mann*, 9 P. R. 473—Q. B. D.

Quære, where land is taken under an Act of the Dominion Parliament, whether the finding of the arbitrators can be reviewed under the statute of Ontario, 38 Vict. c. 15, O. *Norvall v. Canada Southern R. W. Co.*, 5 A. R. 13.

By the Dominion Act 32 & 33 Vict. c. 29, s. 44, the selection of jurors in criminal cases is authorised to be in accordance with the provincial laws, whether passed before or after the coming into force of the B. N. A. Act, subject, however, to any provision in any Act of the parliament of Canada, and in so far as such laws are not inconsistent with any such Act. By the Provincial Acts 42 Vict. c. 14, and 44 Vict. c. 6, the mode of selection of jurors in criminal cases, as provided by C. S. U. C. c. 31, as amended by 26 Vict. c. 44, was changed by excluding the clerk of the peace as one of the selectors, and requiring the selection to be made only from those qualified to serve as jurors whose surnames began with certain alphabetical letters, instead of from the whole body of those competent to serve as previously required. The jury in ques-

tion were selected under these Provincial Acts. Semble, that the 32 & 33 Vict. c. 29, D., was not ultra vires of the Dominion Parliament as being a delegation of their powers, and that the selection made in accordance with the Provincial Acts, was valid. *Regina v. O'Rourke*, 32 C. P. 388.

Quære, whether the selection and summoning of jurors is a matter of procedure, or relates to the constitution and organization of criminal courts. *Ib.*

By 32 & 33 Vict. c. 29 s. 44, D., every person qualified and summoned to serve as a juror in criminal cases according to the law in any province is declared to be qualified to serve in such province, whether such laws were passed before the B. N. A. Act, or after it, subject to and in so far as such laws are not inconsistent with any Act of the Parliament of Canada. By 42 Vict. c. 14 and 44 Vict. c. 6, O., the mode of selecting jurors in all cases formerly regulated by 26 Vict. c. 44 was changed. The jury was elected according to the Ontario statutes, and the prisoner challenged the array, to which the crown demurred, and the judgment was given for the crown. The prisoner was found guilty and sentenced and he then brought error:—Held, per Hagarty, C. J., that the Dominion statute was not ultra vires by reason of its adopting and applying the laws of Ontario as to jurors to criminal procedure. *Regina v. O'Rourke*, 1 O. R., Q. B. D. 464.

Quære, can the Dominion parliament give an appeal in a case in which the legislature of a province has expressly denied it. *Danjou v. Marquis*, 3 S. C. R. 251.

Held, 1, that the Act of the parliament of Canada, 41 Vict. c. 16, "An Act respecting the traffic in intoxicating liquors" cited as the "Canada Temperance Act, 1878," is within the legislative capacity of that body. *The Mayor, &c., of Fredericton v. The Queen*, 3 S. C. R. 505.

2. That by the British North America Act, 1867, plenary powers of legislation are given to the Parliament of Canada over all matters within the scope of its jurisdiction, and that they may be exercised either absolutely or conditionally; in the latter case the legislation may be made to depend upon some subsequent event, and be brought into force in one part of the Dominion and not in the other. *Ib.*

3. That under sub-s. 2 of s. 91, B. N. A. Act, 1867, "regulation of trade and commerce," the parliament of Canada alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it, and the court has no right whatever to enquire what motive induced parliament to exercise its powers. Henry, J., dissenting. *Ib.*

Quære, per Cameron, J., as to the power of the local legislature to limit or authorize municipalities to limit the number of licenses and as to the effect of the decision of the Supreme Court in *City of Fredericton v. The Queen*, 3 S. C. R. 505. *Regina v. Howard*, 45 Q. B. 346.

Held, that the Canada Temperance Act, 1878, which, in effect, wherever throughout the Dominion it is put in force, uniformly prohibits the sale of intoxicating liquors, except in whole-

sale quantities, or for certain specified purposes, regulates the traffic in the excepted cases, makes sales of liquors in violation of the prohibitions and regulations contained in the Act criminal offences, punishable by fine, and for the third or subsequent offence by imprisonment, is within the legislative competence of the Dominion Parliament. *Russell v. The Queen*, 7 App. Cas. 829.

The objects and scope of the Act are general, viz: to promote temperance by means of a uniform law throughout the Dominion. They relate to the peace, order, and good government of Canada, and not to the class of subjects, "property and civil rights." Provision for the special application of the Act to particular places does not alter its character as general legislation. *Ib.*

Subjects which in one aspect and for one purpose fall within sec. 92 of the British North America Act, 1867, may in another aspect and for another purpose fall within sec. 91. *Russell v. The Queen*, 7 App. Cas. 829, explained and approved:—Held, that the Liquor License Act of 1877, R. S. O., c. 141 which in respect of secs. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., does not in respect of those sections interfere with "the general regulation of trade or commerce," but comes within Nos. 8, 15, and 16, of sec. 92 of the Act of 1867, and is within the powers of the Provincial Legislature. *Hodge v. The Queen*, 9 App. Cas. 117.

Held further, that the local legislature had power by the said Act of 1867, to entrust to a board of commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto. *Ib.*

"Imprisonment" in No. 15 of sec. 92 of the Act of 1867, means imprisonment with or without hard labour. *Ib.* S. C. sub. nom.; *Regina v. Hodge*, *Regina v. Frawley*, 7 A. R. 246; reversing S. C.; 46 Q. B. 141, 153; *Regina v. Allbright*, 9 P. R. 25; *Regina v. Pipe*, 1 O. R. 43.

By clause 8 of the 92nd section of the B. N. A. Act, exclusive power is given to the provincial legislatures to make laws in relation to "municipal institutions in the province," and clause 9 gives similar power in relation to "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes." Per Spragge, C. J., that clause 9 is cumulative to clause 8, and was intended to authorize provincial legislation in relation to licenses, for the purpose of raising a revenue as well as for the regulation of matters of police. *Regina v. Hodge*; *Regina v. Frawley*, 7 A. R. 246.

Held, that the debentures in suit which had been issued under the authority of the Canadian Act (16 Vict. c. 235), by the trustees of the Quebec turnpike roads, appointed under Ordinance, 4 Vict. c. 17, and empowered thereby to borrow moneys "on the credit and security of the tolls thereby authorised to be imposed, and of other moneys which might come into the possession and be at the disposal of the said trustees, under and by virtue of the Ordinance, and not to be paid out of or chargeable against the general revenue of this province," did not create a liability on the part of the province,

in respect of either the principal or interest thereof. *The Queen v. Belleau*, 7 App. Cas. 473; 7 S. C. R. 53.

Held, further, that the province of Canada had not by its conduct and legislation recognised its liability to pay the same. The 7th section of the Act, 16 Vict., expressly took away the power which had been conferred by the 27th section of the Ordinance to make advances out of provincial funds for the payment of interest, and by its proviso distinguished these debentures from those which had a provincial guarantee. *Ib.*

Held that lands in Canada escheated to the crown for defect of heirs belong to the Province in which they are situate and not to the Dominion. *The Attorney-General of Ontario v. Mercer*, 8 App. Cas. 767; 5 S. C. R. 538.

At the date of passing the B. N. A. Act, 1867, the revenue arising from all escheats to the crown within the then Province of Canada, was subject to the disposal and appropriation of the Canadian legislature and not of the crown. Although sec. 102 of the Act imposed upon the dominion the charge of the general public revenue as then existing of the provinces, yet by sec. 109 the casual revenue arising from lands escheated to the crown after the union was reserved to the provinces, the words "lands, mines, minerals, and royalties" therein including, according to their true construction, royalties in respect of lands such as escheats. *Ib.*

Held, that the Canada Central railway acquired under their charter granted by the Act 19 & 20 Vict. c. 112, and subsequent Acts relating thereto passed prior to confederation the right, which was preserved by s. 109 of the B. N. A. Act, to enter on the crown lands in the province of Ontario on the line of the railway included in a subsequent timber license granted to the plaintiff, and to cut the timber within six rods of either side thereof, without any restriction as to obtaining the consent of the Lieutenant-Governor in council. *Booth v. McIntyre et al.*, 31 C. P. 183.

Semble, that in the case of railway companies within the exclusive jurisdiction of the dominion parliament, it has the power to confer upon such companies the right of constructing their lines through the crown lands of the several provinces through which they may pass, without such consent of the Lieutenant-Governor in council. *Ib.* See also *Foran v. McIntyre et al.* 45 Q. B. 288.

By 18 Vict. c. 33, the Grand Junction Railway Co., which was to run from the town of Peterborough to Toronto, was, with certain other companies, incorporated with the Grand Trunk Railway Co. Not having been built within the stipulated time, the charter of the former company expired, and in May, 1870, the Grand Trunk Railway having refused to construct it, an Act was passed by the dominion parliament 33 Vict. c. 53, dissociating the work from the Grand Trunk Railway Co., and reviving the charter of the Grand Junction Railway Co. It directed that all the corporate powers originally vested in that company should be vested in certain persons, who should exercise the same as fully as the parties named in the original charter could have done, and extended the time for construction. On the 23rd of November, of

the same year, the ratepayers of the defendant municipality voted in favour of granting the company a bonus of \$75,000, but the by-law was never read a third time. At the time the municipality had no power to grant a bonus to a railway company, but subsequently, in 1871, by 34 Vict. c. 48, O., the by-law was declared as valid as if it had been read a third time. It was declared to be binding on the corporation, and they were directed to act upon it and issue debentures, as if it had been proposed after the Act. On the same day the municipal law was amended so as to empower all municipalities to grant aid for similar purposes. 37 Vict. c. 43, O. was then passed, amending and consolidating the Acts relating to the plaintiff's railway, but it did not expressly give retrospective validity to anything that had been done, or mention the by-law, and by 39 Vict. c. 71, O., the time for completion was further extended, and it was directed that none of the by laws should lapse by reason of non-completion within the time previously fixed. Held, reversing the judgment of the Q. B. 45 Q. B. 302, that the Grand Junction Railway Co., being a local work of the province of Ontario, the Act 33 Vict. c. 53, was ultra vires of the dominion parliament, and that the company were therefore not in existence when the defendants granted the bonus, or when the Act 34 Vict. c. 48, validating the by-law was passed; and as 37 Vict. c. 43, O., which was the first Act by a legislature having power to incorporate them, did not legalize the by-law in favour of the plaintiffs, they were not entitled to a mandamus to compel the delivery of the debentures. *Re Grand Junction Railway v. The County of Peterborough*, 6 A. R. 339.

Held, also that, the railway being wholly within the province of Ontario, the dominion parliament had no power, under the B. N. A. Act, to incorporate the company without expressly declaring the work to be one for the general advantage of Canada or of two or more of the provinces. *Ib.*

On 1st January, 1874, the minister of marine and fisheries of Canada, purporting to act under the powers conferred upon him by s. 2, c. 60, 31 Vict., executed on behalf of Her Majesty to the suppliant an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the South West Miramichi River in New Brunswick for the purpose of fly-fishing for salmon therein. The locus in quo being thus described in the special case agreed to by the parties:—"Price's Bend is about forty or forty-five miles above the ebb and flow of the tide. The stream for the greater part from this point upward is navigable, for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow." Certain persons who had received conveyances of a portion of the river, and who, under such conveyances, claimed the exclusive right of fishing in such portion, interrupted the suppliant in the enjoyment of his fishing under the lease granted to him, and put him to certain expenses in endeavouring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease. The supreme court of New Brunswick having decided adversely to his ex-

clusive right to fish in virtue of said lease, the suppliant presented a petition of right and claimed compensation from Her Majesty for the loss of his fishing privileges and for the expenses he had incurred. By special case certain questions (which are given in the report) were submitted for the decision of the court, and the exchequer court held inter alia that an exclusive right of fishing existed in the parties who had received the conveyances, and that the minister of marine and fisheries consequently had no power to grant a lease or license under s. 2 of the Fisheries Act of the portion of the river in question, and in answer to the 8th question, viz.: "where the lands (above tidal water) through which the said river passes are ungranted by the crown, could the Minister of marine and fisheries lawfully issue a lease of that portion of the river?" Held, that the minister could not lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river. The appellant thereupon appealed to the supreme court of Canada on the main question: whether or not an exclusive right of fishing did so exist:—Held (affirming the judgment of the exchequer court) 1st, the general power of regulating and protecting the fisheries under the British North America Act, 1867, s. 91, is in the parliament of Canada, but that the license granted by the minister of marine and fisheries of the locus in quo was void because said Act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the Miramichi river flows. *The Queen v. Robertson*, 6 S. C. R. 52.

2nd, That although the public may have in a river, such as the one in question, an easement or right to float rafts or logs down and a right of passage up and down in Canada, &c., wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the right of the owners of property opposite their respective lands ad medium filum aquæ. *Ib.*

3rd. That the rights of fishing in a river, such as is that part of the Miramichi from Price's Bend to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made there is no authority given by the B. N. A. Act, 1867, to grant a right to fish, and the dominion parliament has no right to give such authority. *Ib.*

4th. Per Ritchie, C. J., and Strong, Fournier and Henry, JJ., (reversing the judgment of the exchequer court on the 8th question submitted) that the ungranted lands in the province of New Brunswick being in the crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is in the crown as trustee for the benefit of the people of the province, and therefore a license by the minister of marine and fisheries to fish in streams running through provincial property would be illegal. *Ib.*

G. (defendant) was in possession of a part of the foreshore of the harbour of Summerside, and had erected thereon a wharf or block at which vessels might unload. H. et al. (the plaintiffs) brought an action of ejectment to recover posses-

sion of the said foreshore. H. et al.'s title consisted of letters patent under the great seal of Prince Edward Island, dated 30th August, 1877, by which the crown in right of the island, and assuming to act in exercise of authority conferred by a provincial statute, 25 Vict. c. 19, purported to grant to plaintiff in fee simple the land sought to be recovered in the action:—Held, that under B. N. A. Act, s. 108, the soil and bed of the foreshore in the harbour of Summerside belonged to the Crown, as representing the dominion of Canada, and therefore the grant under the great seal of Prince Edward Island to H. et al. was void and inoperative. *Holman v. Green*, 6 S. C. R. 707.

Under the imperial statute, 14 & 15 Vict. c. 63, regulating the boundary line between old Canada and New Brunswick, the whole of the bay of Chaleurs is within the present boundaries of the provinces of Quebec and New Brunswick, and within the dominion of Canada and the operation of the Fisheries Act, 31 Vict. c. 60. Therefore the act of drifting for salmon in the bay of Chaleurs, although that drifting may have been more than three miles from either shore of New Brunswick or of Quebec abutting on the bay, is a drifting in Canadian waters and within the prohibition of the last mentioned Act, and of the regulations made in virtue thereof. *Mowat v. McFee*, 5 S. C. R. 66.

The plaintiffs sued the defendant for the proportion of fees received by the defendant as registrar, to which they were entitled under R. S. O. c. 111, ss. 98 to 103. The defendant demurred to the declaration on the ground that these sections were ultra vires of the local legislature, as they imposed an indirect tax and not a tax for raising a revenue for provincial purposes:—Held, affirming the judgment of Armour, J., that having received the money in question under the above Act, the defendant could not deny that he received it for the purposes therein provided:—Held, also, that if a tax at all, it was clearly a direct tax, and intra vires. *County of Hastings v. Ponton*, 5 A. R. 543.

As to application of Railway Accident Act, 1881 (44 Vict. c. 22 Ont.) See *Monkhouse v. The Grand Trunk R. W. Co.*, 8 A. R. 637.

As to validity of R. S. O. c. 116 s. 5 respecting Bills of Lading. See *Hately v. Merchants' Despatch Co. et al.*, 2 O. R. 385.

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11. *Of Warranty*—See WARRANTY.
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I. MAKING THE CONTRACT.

1. *By Letters.*

After a conversation had taken place between the defendants' manager and one of the plaintiffs as to the latter supplying defendants, according to bill furnished by them, with 100,000 feet or more of lumber of equal quality to a former delivery, namely, firsts and seconds, the defendants

to send up and inspect; the defendants on 11th May wrote, asking whether the lumber would soon be ready for inspection: that they wanted to buy about 100,000 feet. The plaintiffs replied that the lumber would be ready about the 1st June; that they were getting out certain sizes, and they would cut the 100,000, the defendants to send their bill of sizes, the price to be \$80 per thousand, Nos. 1 and 2, f. o. b. at the plaintiffs' place. On 18th May defendants wrote that if the lumber was as represented, American inspection, they would take the sizes, mentioning them, making in all 119,000 feet. On 23rd May the plaintiffs wrote objecting to American inspection, but agreeing to a reasonable inspection. On 25th May the defendants replied, asking to be informed a week before the plaintiffs were ready if possible; and on the 20th June, they again wrote, asking when it would be ready for inspection, so that they could go up:—Held, Galt, J., dissenting, that the correspondence shewed a completed contract between the parties; and that although in some subsequent correspondence, set out in the report of the case, the plaintiff's attempt to set up a different contract, this could have no effect on the contract which had already been entered into. *Fulton et al. v. Upper Canada Furniture Co.*, 32 C. P. 422. Reversed on appeal, see 9 A.R.

See also *Ockley v. Masson*, 6 A. R. 108.

2. *Time and Place of Making and Performing.*

The plaintiff, at Kingston, Ontario, having on the 20th October, ascertained from the defendant, the price for forging a cross-head for an engine, wrote on the same day to the defendant at Montreal, Quebec, asking him to ship the cross-head to him at Kingston as "soon as finished, per G. T. R." In answer defendant wrote that the matter would have immediate attention, "and as soon as ready I will ship to your address." The cross-head was subsequently shipped to plaintiff at Kingston as directed, when a defect in the forging was discovered, and after being used on the plaintiff's steamer for some months it broke at the defective point. On a motion to set aside the service of the writ herein the plaintiff undertook to prove at the trial a cause of action which arose in Ontario, or in respect of a contract made therein, within the R. S. O. c. 50, s. 49:—Held, reversing the decision of the Common Pleas, 31 C. P. 164, that the contract being to forge and deliver on the Grand Trunk railway at Montreal, was a contract made in the province of Quebec, and the defect in the beam, being the breach of the warranty that it should be reasonably fit for the purpose for which it was made, existed when it left the workshop at Montreal, the breach also occurred in that province, and the plaintiff therefore must be nonsuited. *Gildersleeve v. McDougall*, 6 A. R. 553.

Where the defendants in a suit reside in this country, and the principal office of the plaintiffs is in England, and a contract is entered into there between the parties which is to be executed in New York, a suit in respect thereof may be instituted in this province. *Direct United States Cable Co. (Limited) v. The Dominion Telegraph Co.*, 28 Chy. 648.

See also *Court v. Scott*, 32 C. P. 148; *Regina v. Dautre*, 6 S. C. R. 342.

3. Other Cases.

Necessity for seal in contracts with corporations. See *Albert Cheese Co. v. Leeming et al.*, 31 C. P. 272; *Ontario Co-Operative Stone Cutters' Association v. Clarke et al.*, *Ib.* 280; *Silsby v. Corporation of the village of Dunnville*, *Ib.* 301; *Ellis v. The Midland R. W. Co.*, 7 A. R. 464.

An agreement to insure may be made by parol. *Wright v. The Sun Mutual Life Insurance Co.*, 5 A. R. 218.

Held, that an express or implied contract for safe transport is not created with the Crown because an individual pays tolls, imposed by statute for the use of a public work, such as slide dues, for passing his logs through government slides. *Regina v. McFarlane et al.*, 7 S. C. R. 216.

II. SUFFICIENCY OF CONSIDERATION.

E., carrying on the trade or calling of a dealer in pictures and photographic business, sold out such business to W., and by the agreement covenanted "not to open or start a retail and photographic business of a similar character" in the City of Toronto for five years. By a subsequent agreement the first was modified, so as to allow E. to sell in any manner to persons residing out of Toronto, and to sell retail in Toronto, on allowing W. a percentage on the prices realized. W. filed a bill alleging that E. had, prior to such second agreement, sold goods in contravention of the first agreement, and had subsequently sold to a large amount, and prayed an account and payment of his percentage. The court (Spragge, C.) being of opinion that such second agreement had been executed for a valuable consideration, granted the decree as asked, and directed the account to be taken by the master, although the answer professed to state the actual amount of sales, and on the motion for decree the answer had been read as evidence by the plaintiff. *Williamson v. Ewing*, 27 Chy. 596.

III. OPERATION OF THE STATUTE OF FRAUDS.

1. Agreements not to be Performed within a Year.

In an action on a verbal agreement made in November, for the hiring of plaintiff by defendant for a year from the 1st of December then next:—Held, that there could be no recovery for wrongful dismissal, the agreement being one not to be performed within a year: and that there being an express agreement in fact, no other agreement for a monthly hiring could be implied. *Harper v. Davies*, 45 Q. B. 442.

Held, reversing the judgment of the county court of York, that a contract for hiring for a year or more defeasible within the year, is within the fourth section of the Statute of Frauds. The agreement, as alleged by the plaintiff, was made in February, 1880, whereby the defendant was to pay him for his services while he should remain in defendant's employment, at the rate of \$500 a year, for one year, and thereafter at such salary as might be agreed upon; the plaintiff to enter upon his duties, and his salary to commence on the 3rd of March, then next, and defendant was to be at liberty to determine the employment at the expiration of a month named, otherwise

the agreement to remain in full force for a year, and for such longer period as might be agreed:—Held, clearly within the statute. *Booth v. Prittie*, 6 A. R. 680.

The court will enforce a verbal agreement, although it is to do an act which is not to be performed within a year from the time of making the agreement, where the consideration therefor has been executed. *Halloran v. Moon*, 28 Chy. 319.

IV. VALIDITY AS REGARDS PUBLIC POLICY.

A. being about to sell a certain property, and in order to induce his wife, B., to bar her dower, entered into an agreement under seal, that all money to be received as purchase money for the same, as well as all rents received from a certain farm of A.'s should be invested in the joint names of A. and one C., and the income paid over by C., who was authorized to draw the same, to B. "as she may require it for the maintenance of A. & B. and their family."—Held, a valid agreement, and not opposed to public policy. *Lavin v. Lavin*, 2 O. R., Chy. D. 187.

See *Williamson v. Ewing* 27 Chy. 596 p. 127; See also *Roberts v. Hall*, 1 O. R. 388; *Meredith v. Williams*, 27 Chy. 154.

V. CONSTRUCTION OF CONTRACTS.

1. Conditions Precedent.

O. D. & Co. contracted with the government to complete certain telegraph works, and M. afterwards contracted with O. D. & Co. to construct part of the said works, in which latter contract O. D. & Co. covenanted to pay M. at the rate mentioned therein per mile, but the contract was expressed to be subject to the condition that the said payments should be made to M. within twenty days after the estimate of the engineer in charge, to be by him put in from time to time to the minister of public works, and service of a copy of such estimate on O. D. & Co.:—Held, that this alone, apart from other portions of the contract, was sufficient to make such estimate and service of a copy thereof a condition precedent to M.'s right to recover for work done under his contract. *McDonald v. Oliver et al.*, 3 O. R., Chy. D. 310.

Furthermore, by a third contract T. M. and G. M. contracted with both M. and O. D. & Co. to make advances to M., and to become security for M.'s due completion of the work, it being agreed therein that "upon the completion of the contract O. D. & Co. should pay T. M. and G. M. the amount due them by M. for supplies, before paying anything:—Held, that there must be an amount owing by O. D. & Co. to M., for which M. could recover against them, before O. D. & Co. were liable under the above contract to pay T. M. and G. M. anything, and that the intention was only to enable T. M. & G. M. to intercept payment by O. D. & Co. to M. of money due from them to M. *Ib.*

See also *The Montreal City and District Savings Bank v. Corporation of the County of Perth*, 32 C. P. 18; *Blake v. Kirkpatrick*, 6 A. R. 212; *O'Brien v. The Queen*, 4 S. C. R. 529;

Isabester v. The Queen, 7 S. C. R. 695; *Jones v. The Queen*, 7 S. C. R. 570; *Provincial Insurance Co. v. Cameron*, 31 C. P. 523; 9 A. R. 56.

2. Implied Conditions.

Where a road company, empowered by statute to run a traction engine over the highways of a certain county, entered into an agreement with the corporation of the county, whereby, after reciting the said statute, it was agreed that the company should be at liberty to lay down a tramway along a certain road, that tolls to be collected should not exceed seven cents, for cars drawn by one horse, and ten cents for cars drawn by two horses; that the company, if required, should run two passenger cars daily each way, or in lieu thereof an omnibus or sleigh, that in case horses, carriages, teams, or other vehicles or animals met the horses, waggons, carriages, or other vehicles of the company, the latter should have the right of way, and that "so soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county, and shall discontinue the use of the said traction engine, and of any other traction engine upon or along such public highways;" and the company insisted on their right, under this agreement, to run a steam motor upon their said tramway:—Held, that, though the words "traction engine" must be understood in their ordinary sense, as an engine running on the roadway itself, and not on a tramway, yet the above stipulations themselves were such, that a qualification must be implied in the agreement excluding the use of steam as a motive power altogether, and indicated that horses were the kind of power intended to be used in the traction of the cars:—Held, also, that the fact that the company for several years after the said agreement used horse power only, was not to be overlooked as evidencing the true agreement of the parties. *The Corporation of the County of York v. The Toronto Gravel Road and Concrete Co.*, 3 O. R., Chy. D. 584.

3. Other Cases.

Appellant, part owner of a vessel, brought an action against respondents, merchants and ship brokers in England, alleging in his declaration that while he had entire charge of said vessel as ship's husband, they, being his agents, refused to obey and follow his directions in regard to said vessel, and committed a breach of an agreement by which they undertook not to charter nor send the vessel on any voyage, except as ordered by appellant, or with his consent. On the trial it appeared that E. V., a brother of respondents, had obtained from appellant a fourth share in the vessel, the purchase being effected by one of the respondents; and it was also shewn that the agreement between the parties was as alleged in the declaration. On the arrival of the vessel at Liverpool, respondents went to a large expense in coppering her, contrary to directions, and sent her on a voyage to New Orleans, of which appellant disapproved. Appellant wrote to respondents, complaining of their conduct and protesting against the expense

incurred. They replied that appellant could have no cause of complaint against them in their management of the vessel, and alleged they would not have purchased a fourth interest in the vessel, if they had not understood that they were to have the management and control of the vessel when on the other side of the Atlantic. A correspondence ensued, and on the 17th November, 1869, appellant wrote to them, referring to the fact that respondents complained of the "eternal bickerings," and that it was not their fault. He then reasserted his right to control the vessel, stated in detail, his grounds of complaint against them, and closed with the words: "To end the matter, if your brother will dispose of his quarter, I will purchase it, say for \$4,200 in cash." This amount was about the same price for the share as appellant had sold it for some years before. Respondents accepted the offer, and the transfer was made to appellant:—Held, on appeal, reversing the judgment of the Supreme Court of New Brunswick, that the expression "to end the matter" should be construed as applying to the bickerings referred to, and there had not been an accord and satisfaction, the contract having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name. *Weldon v. Vaughan*, 5 S. C. R. 35.

VI. PERFORMANCE.

1. Excuse for non-performance.

Where the plaintiff was engaged by the defendants for "the season," i.e., from early in May till some time in November, as master to manage the steamer *Idyl-Wyld* for \$1,000, and he continued so employed until September, when the steamer was burnt:—Held, that the plaintiff was not entitled to more than a proportionate share of the salary agreed upon, for the contract was subject to the continued existence of the vessel, and performance was excused by its destruction without the default of the defendant. Semble, that such a contract made verbally with the president of the defendant company might be binding; and that a nonsuit for want of the corporate seal was properly set aside. *Ellis v. The Midland R. W. Co.*, 7 A. R. 464.

The plaintiff lent P. a sum of money, for securing the repayment of which P. gave a chattel mortgage on goods; which P. was to retain possession of, and the defendant executed a bond, conditioned that in default of payment the goods should be forthcoming for the purpose of seizure and sale under the mortgage. Before the day of payment arrived the goods were destroyed by fire, and an action having been commenced against the defendant on his bond, he pleaded the fact of such destruction without any default on his part:—Held, bad on demurrer, for not negating any default on the part of P.,—*Cameron, J.* dissenting. *Boswell v. Sutherland*, 8 A. R. 233; 32 C. P. 131.

See also *Stevenson v. Bain*, 8 P. R. 166, 258.

CONTRACTOR.

See WORK AND LABOUR.

Liability of contractor subject to insane delusions within the knowledge of one of the plaintiffs. See *Robertson et al. v. Kelly*, 2 O. R., Q. B. D. 163.

See *Walker et al. v. McMillan*, 6 S. C. R. 241.

CONTRIBUTION.

By SURETIES—See PRINCIPAL AND SURETY.

Held, that a third person holding a note for the benefit of one joint endorser, cannot maintain a joint action against the co-endorsers under R. S. O. c. 116, ss. 2, 3, as endorsers for the full amount of the note, but must sue each separately in a special action for his share of the contribution. *Small v. Riddell et al.*, 31 C. P. 373.

CONTROVERTED ELECTIONS.

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II. PARLIAMENTARY AND LEGISLATIVE ELECTIONS—See PARLIAMENT.

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A conviction must be under seal. *In re Ryer and Plows*, 46 Q. B. 206.

Amendment of. See *McLellan v. McKinnon*, 1 O. R. 219; *Regina v. Bennett*, 1 O. R. 445; 3 O. R. 45.

CO-OPERATIVE ASSOCIATION.

Held, that R. S. O. c. 158, s. 15, an Act respecting co-operative associations, which requires the business there referred to to be a cash business, does not prevent an association formed to carry on a "labour" or "trade," from entering into contracts on credit necessary for and incidental to such labour or trade—other than contracts of buying or selling—such as contracts for work or services. *Ontario Co-operative Stone Cutters' Association v. Clarke et al.*, 31 C. P. 280.

CORONER.

A coroner for the county of Carleton was held to have jurisdiction to hold an inquest in the city of Ottawa, situate in that county. *Regina v. Berry*, 9 P. R. 123—Osler.

The inquisition was held to be defective in not identifying the body of the deceased as being the person with whose death the prisoner was charged; but the prisoner was re-committed, as the evidence shewed that a felony had been committed. *Ib.*

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8. *Road Companies*—See WAY.
9. *School*—See PUBLIC SCHOOLS.
10. *Particular Corporations*—See THEIR SEVERAL TITLES.

I. CORPORATE NAME AND EXISTENCE.

The plaintiff sued "The Commissioners of the Cobourg Town Trust," in whom the harbour at Cobourg is vested in fee by 22 Vict. c. 72, for damages for loss of his vessel, caused by the negligence of defendants, who by their plea merely traversed the negligence. At the trial plaintiff was nonsuited, on the objection that defendants were sued as a corporation, but were not so under the statute:—Held, that this objection should have been raised by plea, and was not open to defendants on this record; and semble, that if open, defendants were a corporation. Leave was granted to amend, if desired, by substituting the names of the commissioners. *McSherry v. The Commissioners of the Cobourg Town Trust*, 45 Q. B. 240.

See also *Provincial Insurance Co. v. Cameron*, 31 C. P. 523; 9 A. R. 56; *Grand Junction R. W. Co. v. Midland R. W. Co.*, 7 A. R. 681.

II. STOCK.

1. Allotment and Acceptance.

The defendants, as partners, had been appointed agents of the plaintiffs, on condition that they should become holders of 200 shares of the capital stock of the company. In pursuance of this arrangement they were entered in the stock register of the company for that number of shares, under the partnership name; and 200 shares of the original stock were allotted to them and the usual certificate sent. They did not, however, formally subscribe for the stock. A draft upon the firm for the first call was accepted and paid, as arranged with one of the defendants. Subsequently, E. wrote to the plaintiffs that he was about retiring from the firm, and desiring to be informed as to the position of the "stock subscribed for by them": signing the letter as "senior partner," &c.:—Held, in an action for calls, that the defendants were liable, and could not be heard to say that they had not subscribed for the stock:—Held, also, that it was unnecessary to shew that any specific shares had been allotted to the defendants; or that the calls were made by properly constituted directors. *National Insurance Co. v. Eagleson*, 29 Chy. 406.

The plaintiff, a creditor of a railway company, sued the defendant, as a shareholder therein, for unpaid stock. The defendant had signed the stock book which was headed with an agreement by the subscribers to become stockholders for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares," they covenanted to pay the company ten per cent. of the amount of said shares and all further calls. A resolution was subsequently passed by the company instructing their secretary to issue allotment cer-

tificates to each shareholder for the shares held by him. The secretary accordingly prepared such certificates, the one for the defendant representing that the company "in accordance with your application for 50 shares," &c., "have allotted you shares amounting to \$5000." These certificates were not sent to the shareholders, but were handed to the company's brokers for delivery to them. The brokers published a notice in a daily paper that these certificates were lying at their office, but did not send written notices to the subscribers. The defendant never called for or received his certificate of allotment and never paid the ten per cent. He swore that he signed upon a verbal agreement with one L., a promoter and a provisional director of the company, that he and another should receive the contract for building the road, which was never awarded to them; and that he never had any notice of the allotment having been made to him. The learned judge at the trial was unable to say whether the defendant received actual notice of allotment, but found that the company sent notices to him of calls; and that his name was published as a shareholder in a newspaper to which he was a subscriber. The only evidence of the notices being sent to the defendant was the general statement of the secretary, that he directed notices to be sent ten months after the allotment, to those shareholders likely to pay, that their calls were due:—Held, reversing the judgment of the Queen's Bench, Moss, C. J. A., dissenting, that the defendant was not liable, as the evidence, more fully set out in the report of the case was not sufficient to prove notice of allotment to him:—Held, also, that if he had received notice of allotment, the fact that the contract was not awarded, as promised, would have formed no defence, as L. had no power to bind the company by annexing such an agreement to his subscription. Per Burton, J. A., that even if a notice of calls were sufficient to prove notice of allotment, the defendant would not have been bound by such a notice received ten months after his subscription. *Nasmyth v. Manning*, 5 A. R. 126.

Held, affirming the judgment of the Court of Appeal, that the document signed by the respondent was only an application for shares, and that it was necessary for the appellant to have shewn notice within a reasonable time of the allotment of shares to respondent, and that no notice whatever of such allotment had been proved. (Ritchie, C. J., and Gwynne, J., dissenting.) *S. C.*, 5 S. C. R. 417.

Claim: calls upon shares for which the defendant's testator had subscribed, and upon which he had paid ten per cent. at the time of subscription. Defence: by a by-law of the plaintiff company no subscriber of stock should be a shareholder until the same had been allotted to him by order of the board. The testator subscribed for fifty shares, or any portion thereof which might be allotted to him, but no allotment was ever made:—Held, on demurrer, bad; for the by-law did not extend to a case in which a person on subscribing paid the necessary deposit, in whom the shares would vest under 39 Vict. c. 93, s. 2, (O.) the plaintiff company's Act of incorporation. *The Union Fire Ins. Co. v. Lyman*, 46 Q. B. 453.

The Ontario Wood Pavement Company, incorporated under 27-28 Vict. c. 23, with power to increase by by-law the capital stock of the company so soon as, but not before, the original stock was all allotted and paid up, assumed to pass a by-law increasing the capital stock before the original amount had been paid up. The plaintiffs, execution creditors of the company, whose writ had been returned unsatisfied, instituted proceedings by way of sci. fa. against the defendant as holder of shares of the new or increased capital stock:—Held, (reversing the judgment of the court below, 30 C. P. 108) that the by-law so passed by the company being ultra vires, the alleged shares of the defendant had not any existence in law, and therefore that the plaintiffs failed to establish that the defendant was a shareholder within the statute, and consequently they were not entitled to recover; but the appeal being allowed on a ground not taken in the court below or assigned as a reason of appeal, the court refused the appellant his costs in appeal. And per Cameron, J., quære, whether the defendant might not have shewn that the transfer to him had been made by way of security only so that he was not a shareholder within the words of the statute, and therefore not liable for calls. *Page et al. v. Austin*, 7 A. R. 1. Affirmed by the Supreme Court.

The Stadacona Insurance Company incorporated in 1874, employed local agents to obtain subscriptions for stock in the district of Quebec, such local agents to receive a commission on shares subscribed. At the solicitation of one of these local agents F. X. C., intending to subscribe for five paid up shares, paid \$500 and signed his name to the subscription book, the columns for the amount of the subscription and the number of shares being at the time left in blank. These columns were afterwards, in the presence of appellant, filled in with the number of shares (50 shares) by the agent of the company, without F. X. C.'s consent. Having discovered his position, one of appellant's brothers, who had also subscribed in the same way, went next day to Quebec and endeavoured, but ineffectually, to induce the company to relieve them from the larger liability. At the end of the year 1875, the company declared a dividend of 10 per cent. on the paid-up capital (montant versé), and the plaintiff received a cheque for \$50, for which he gave a receipt. In the following year the company suffered heavy losses, and notwithstanding F. X. C.'s repeated endeavours to be relieved from the larger liability, brought an action against him to recover the third, fourth, fifth, and sixth calls of five per cent. on fifty shares of \$100 each alleged to have been subscribed by F. X. C. in the capital stock of the company:—Held, (Sir W. J. Ritchie, C.J., dubitante,) reversing the judgment of the court below, that the evidence shewed the appellant never entered into a contract to take 50 shares, that the receipt given for a dividend of ten per cent. on the amount actually paid (montant versé), was not an admission of his liability for the larger amount, and he therefore was not estopped from shewing that he was never in fact holder of fifty shares in the capital stock of the company. *Colé v. Stadacona Ins. Co.*, 6 S. C. R. 193.

See *Long v. Guelph Lumber Co.*, 31 C. P. 129, p. 144.

2. Calls.

(a) Notice of.

The notice of two calls, one payable on the 27th of July, the other on the 27th of August, was mailed at Montreal, on the 27th of June, addressed to the firm at Ottawa, which was received by one of the defendants. There was not any affirmative evidence that it was not communicated by him to his co-partner:—Held, that such notice was insufficient as "not less than 30 days' notice" was required; and, therefore the mailing of a notice on the 27th of June, requiring a call to be paid on the 27th of July, was not in time:—otherwise the notice was sufficiently established. *National Ins. Co. v. Eyleson*, 29 Chy. 406.

The 37 Vict. c. 93, s. 7, O., under which the calls sued for were made, provided that thirty days' notice of every call should be given. The resolution making the call, was passed on the 3rd of August, 1881, the call to be payable on the 6th of September. Notice to the defendants, F. & B., was mailed in Toronto, on the 5th day of August, and would reach Ottawa post-office, where F. & B. lived, at 7 p.m., on the 6th. The post-office closed at 7.30 p.m., but the letter could not have been obtained on that evening without personal application to the postmaster. It was received on Monday the 8th of August:—Held, affirming the judgment of Hagarty, C. J., Wilson, C. J., doubting, that the notice must be deemed to have been given upon the mailing, and therefore it was good. Per Wilson, C. J.—If the thirty days were to be computed from the time when the notice had or should have reached its destination, they should begin on the Monday. *The Union Fire Ins. Co. v. Fitzsimmons et al.*, and another case, 32 C. P. 602.

The defendant, S., it appeared, had made an assignment in insolvency, but the stock had not been returned by him as part of his assets, and that the assignee had never accepted it. The notice of call was sent to the assignee, but he directed his book-keeper to forward it to S., which he stated he had done, but the defendant denied its receipt. The plaintiff's manager stated that after the call was due, he paid S. a dividend on the stock, and S. then said the call would be paid:—Held, that S. was still a stockholder, and must be deemed to have had notice. *Id.*

A call was made by resolution of the 3rd August, payable on the 6th September, and notice of it was mailed at Toronto on the 5th August, addressed to defendants at Ottawa, but not received until the 8th:—Held, sufficient, following the last case. *The Union Fire Ins. Co. v. O'Gara; Same Plaintiffs v. Shoolbred*, 4 O. R., C. P. D. 359.

See *Provincial Ins. Co. v. Cameron*, 31 C. P. 523 p. 137; *Nasmith v. Manning*, 5 A. R. 126; 5 S. C. R. 417, p. 134.

(b) Other Cases.

The 12 Vict. c. 157, s. 27, provided that five per cent. should be paid on each share at the time of subscription, and the remainder in such instalments as the directors should appoint, provided that no instalment should exceed ten per cent. upon such stock, or be called for or become

payable in less than thirty days after public notice should have been given "in one or more of the several newspapers published in every district where stock may be held, to that effect."—Held, that under this Act more than one call could be made at the same time, and it was not essential that thirty days should elapse between the payment of each, so long as each call did not exceed ten per cent., and was made payable not less than thirty days after the publication of the notice thereof; that the resolution of directors and not the notice made the call; and that a variation in the days of payment between the resolution and the notice invalidated the call, but not as to defendant Cameron, or her testator, who had made payments on or promised to pay such calls. *Provincial Ins. Co. v. Cameron and six other Cases*, 31 C. P. 523. Affirmed, 9 A. R. 56.

Held, also, that under the said Act the publication of notice in every district where stock was held was not a condition precedent to the right of action against shareholders who had been duly notified. *Ib.*

It was also objected that the calls had been rescinded by resolutions subsequently passed, and set out in the case:—Held, that such resolutions referred only to the terms or time of payment. *Ib.*

Held, also, that upon the facts stated in the case there had been no such preference or discrimination between different classes of shareholders as to invalidate the calls. *Ib.*

Interest was allowed from the time when the last call became due. *Ib.*

Action to recover calls on stock. The defendant's Act of incorporation enabled the directors to make calls at such times as they might deem requisite, provided that successive calls should be made at intervals of not less than two months between such calls, that no call should exceed 10 per cent., and that 30 days notice should be given of every such call:—Held, not necessary that the calls should be made by by-law, but that a resolution was sufficient, and that the resolution need not name the place of payment of the calls, but that this could be done in the notice. *The Union Fire Ins. Co. v. O'Gara*; *Same Plaintiffs v. Shoolbred*, 4 O. R., C. P. D. 359.

A resolution was passed by which a call was made of 10 per cent., payable on the 1st March, and it was thereby further resolved that a further call of 10 per cent. be made payable on 1st September:—Held, clearly not a call of 20 per cent. but two calls of 10 per cent. each; and that the fact of the second call being illegal did not invalidate the first call, because contained in the same resolution. *Ib.*

An alleged third call was objected to as being a fourth call, in that the illegal call before referred to had not been abandoned; but:—Held, that the evidence clearly shewed such abandonment. *Ib.*

In addition to 50 shares personally subscribed by the defendants O. and S. and upon which they were held liable, the plaintiffs claimed that they were holders, respectively, of 75 and 60 shares, for which they had not subscribed:—

Held, on the evidence, set out in the report, that O. was not such holder, but that S., was, and was therefore liable thereon. *Ib.*

Where certain shareholders of the G. L. Company sought to restrain a call on stock, on the ground that it was being made in contravention of the terms of a certain unwritten agreement alleged to have been entered into between all the promoters, when the G. L. Company was formed:—Held, that evidence of such agreement was inadmissible, since it was contradictory of the written agreement entered into by the plaintiffs when subscribing for their shares, viz., to take stock and pay the calls when duly made. *Christopher et al. v. Noxon et al.*, 4 O. R., Chy. D. 672.

Where a by-law making a call on stock was confirmed at a general meeting of shareholders, purporting to be the annual meeting, but not held on the proper day for such annual meeting, as prescribed by the by-laws of the company:—Held, that one who, as a director, had seconded a resolution of the directorate that the meeting should be held on the day it was held on, was estopped from objecting to the call on this ground, and so, therefore, were all those who were co-plaintiffs with him in an action to restrain the said call. *Ib.*

Where shareholders have assisted in making, and approved of calls, they cannot afterwards object that the calls were improperly made. *Ib.*

Where a call is made upon all stockholders without discrimination, or partiality, the Court will never interfere to determine whether it was necessary, or not. *Ib.*

Seem, however, that if calls were made in such a way as to favour one set of stock-holders, and impose an unequal burden upon others, an equity might, perhaps, be found for interference. *Ib.*

Held, that, under R. S. O. c. 150, ss. 37, 41, a shareholder, who is in arrear for unpaid calls, is absolutely debarred from voting at a shareholders meeting, and in any subsequent action by him to restrain a call, the by-law for which was ratified at such a meeting, on the ground that his vote was wrongfully excluded, the above objection can be taken advantage of by the company, though that was not the ground assigned at the time for excluding the vote. *Ib.*

Calls on insurance stock after suspension of license. See *Union Fire Ins. Co. v. Lyman*, 46 Q. B. 471; *Union Fire Ins. Co. v. Fitzsimmons et al.*, 32 C. P. 602.

3. Voting on.

See *Christopher et al. v. Noxon et al.*, 4 O. R. 672, *supra*.

4. Transfer.

The stock of an incorporated street railway company, consisting of 2,000 shares, was owned exclusively by two brothers (G. & W). The charter of the company required that there should be a board of directors consisting of not less than three members, each of whom should hold stock to the amount of not less than \$100.

It having become necessary to raise funds for the purpose of carrying on the business of the company, the two brothers agreed that they should convey to M. (their father) one share each in order to qualify him as a director, and which they did accordingly assign; the father from thenceforth acted as the third director, and the funds for the construction and improvement of the road, were obtained and expended thereon. By his will the father bequeathed these two shares to his daughter S., who, after the death of her father, continued to exercise when necessary, the functions of director. After some time G. became dissatisfied with the manner in which S. discharged her duties as director, alleging that she acted simply as the nominee of W., and finally asserted that the shares had been originally assigned to the father for the avowed purpose of qualifying him to act, but in reality as trustee for G. & W., and that he had not power to dispose of them by will, and filed a bill seeking to have it declared that M. had during his lifetime, and that S. since his death had held these shares simply as trustee of G. & W., and that S. might be ordered to re-assign them. The court, under the circumstances dismissed the bill, with costs. *Kiely v. Smyth*, 27 Chy. 220.

The charter of the company provided that the stock "shall be transferable in such way as the directors shall by by-law direct":—Held, that this did not prevent the transfer of the stock until such a by-law should be passed, but left it as at common law, so that it might be transferred by word of mouth. *Ib.*

Upon the facts stated in the report of this case:—Held, that a transfer was sufficiently shewn. *Ib.*

And, semble, that the plaintiff, one of the directors, should be estopped from alleging that M. was not properly qualified as a director, the effect of which would have been to injuriously affect the value of bonds of the company, to the issue of which the plaintiff was a party. *Ib.*

Held, also, that the transfer to M. was not without consideration, the agreement by the two brothers with each other to make it being sufficient. *Ib.*

See *Provincial Ins. Co. v. Cameron*, and *six other Cases*, 31 C. P. 523; 9 A. R. 56, *infra*.

5. Forfeiture.

In an action for unpaid calls the shares held by the defendant Cameron as executrix and in her own right, were transferred under powers of attorney, which were not produced:—Held, that there was sufficient evidence to shew the existence of such powers, and to let in secondary evidence thereof, the defendant and the testator having fully admitted their liability as owners of the shares; and that the evidence also shewed that there had been no forfeiture, as was urged, of such shares, the alleged forfeiture having been conditional and never completed:—Held, also, that the change in the corporate name of the plaintiffs, as set out in the case, could under the circumstances form no objection to their recovery. *Provincial Ins. Co. v. Cameron*, and *six other Cases*, 31 C. P. 523. Affirmed, 9 A. R. 56.

It was urged that the shares of certain other shareholders had not been legally forfeited, the directors under the original charter not having the power to do so:—Held, that they had such power; but that in any event this could not affect the liability of these defendants. *Ib.*

The plaintiff on becoming a member of the defendant company, agreed to accept his shares subject to the rules of the company. Rule 6 was to the effect that in case of default of payment of dues for a year, the directors might forfeit any share so in default. The plaintiff being in default for a year and upwards the directors declared his shares forfeited, and this proceeding was afterwards confirmed at a meeting of the shareholders. The plaintiff thereupon instituted proceedings to have such forfeiture declared invalid, on the grounds, (1) that notice of the intention to forfeit had not been given to him; (2) that notice of the forfeiture had not been served on him, so that he had been unable to appeal to the shareholders; (3) that the resolution did not expel the plaintiff from membership; (4) that the plaintiff's name was not set forth in full in such resolution; it did not specify the shares to be forfeited, and other persons were included whose shares were jointly forfeited; (5) that no notice had been given of the holding of the annual meeting for the election of directors, so that the directorate was not legally constituted; (6) that one of the directors who voted for the forfeiture had become insolvent under the Act of 1875, although his shares continued to stand in his name in the books of the company; (7) that it was not shewn that proper and sufficient notice had been given of the meeting of the directors at which such forfeiture had been declared; (8) that the plaintiff had capital at his credit in the company out of which the arrears might have been paid; and that by a by-law of the company, "all fines and forfeitures should be charged to members liable, and, if not paid, deducted from capital at the credit of such member":—Held, that these objections could not prevail, and that as to the last, this was not such a forfeiture as was referred to in the rules. *Nellis v. Second Mutual Building Society of Ottawa*, 29 Chy. 399.

When on May 31st, 1880, the directors of a company passed a by-law reducing the numbers of the directorate from five to three, and this was confirmed at an adjourned general meeting of shareholders on June 1st, 1880, and a new board of three forthwith appointed, but, it appeared, no notice had been given either before the original, or the adjourned meeting of the intention of making any such change in the directorate:—Held, that the appointment of the new board was not a legal one, and a resolution by them to forfeit stock for non-payment of calls was invalid, and the forfeiture must be restrained:—Held, also, that the company were properly made parties to an action to restrain such forfeiture, the reduction of the directorate to a board of three being its act. *Christopher et al. v. Noxon et al.*, 4 O. R., Chy. D. 672.

III. DIRECTORS, OFFICERS, AND AGENTS.

1. Election of Directors.

At a meeting of the shareholders of a company, the capital stock of which was held by a few, &

chairman was elected by a majority of the votes of those present, without regard to the stock held by them. Two of the shareholders, who were also provisional directors, and who were candidates for re-election, were appointed scrutineers in the same manner, and directors were then elected, excluding the plaintiff. The plaintiff was president of the company, and held a large amount of stock, sufficient with that held by those who were favourable to him to have controlled the vote if it had been taken according to shares. It was the duty of the scrutineers to decide as to what votes were valid, and they also, with the aid of legal advice, interpreted an instrument under which the plaintiff had advanced a large sum of money to start the company, and which provided for the future disposition of the shares of the company, held by the plaintiff as a security for his advances, and allowed certain persons to vote as being cestui que trusts of a portion of such shares:—Held, that the duty of the scrutineers was so plainly in conflict with their interest as candidates for the directorate that they were disqualified from so acting, and the election was set aside, and a new election ordered, with costs to be paid by the defendants. *Dickson v. McMurray*, 28 Chy. 533.

An election of officers obtained by a trick or artifice cannot be considered a bona fide election, but when shares have been actually purchased and paid for, the fact of their being purchased with a view to influence the election is no objection. *The Toronto Brewing and Malting Co. v. Blake*, 2 O. R., Chy. D. 175.

See *Christopher et al. v. Noxon et al.*, 4 O. R. 672, pp. 138, 140.

2. Meetings of Directors.

Five of the nine of the provisional directors of a railway company being a quorum, four of them met at Winnipeg pursuant to a valid notice under the statute, and adjourned to a day named, when six met at Toronto in alleged pursuance of such advertisement without advertisement or notice under the statute:—Held, that the meeting of the six directors did not constitute a duly organized meeting of directors, though had all the directors who were at the meeting at Winnipeg attended pursuant to the adjournment it might have cured the irregularity. *McLaren et al. v. Fiske et al.*, 28 Chy. 352.

R. S. O. c. 150 requires that companies incorporated thereunder shall have not less than three directors, who shall not be appointed directors unless they are shareholders, and it was provided by the by-laws of the plaintiffs' company that a director should not only be qualified when elected, but that he should continue to be so. The plaintiffs' company was managed by three directors, and one of them disposed of his stock:—Held, that he thereupon ceased to be a director, and the directorate then became incomplete and incompetent to manage the affairs of the company. Semble, also, even assuming that a quorum (2) of the directors could manage the business, yet, where neither the statute nor the by-laws gave the president a casting vote, resolutions passed by such vote, at a meeting attended only by the president and one other

director, were invalid. *The Toronto Brewing and Malting Co. v. Blake*, 2 O. R., Chy. D. 175.

3. Powers of.

(a) Appointment of Agents.

The defendant company was a foreign corporation, whose directors had authority to appoint such subordinate officers as the business of the corporation might require. By power of attorney under the corporate seal, they appointed a general agent at Toronto, to take charge of, conduct and manage the business of the agency at Toronto, and of its sub-agencies, giving him power to do everything necessary and requisite to all intents and purposes as fully as the company could do. He appointed the plaintiff a sub-agent for a year, and at the end of that and each succeeding year he renewed the appointment for a year. The plaintiff was paid \$15 a week and a commission on sales. He was summarily dismissed. Evidence was given for the defence that the corporation were in the habit of appointing their agents and sub-agents at will:—Held, Spragge, C. J. O., dissenting, (affirming the judgment of the Court below refusing an order nisi for a nonsuit,) that the appointment from year to year was clearly within the authority of the directors, that the general authority was delegated to the general agent, and that the plaintiff had a right to rely upon the authority so given when he entered into the engagement. Per Spragge, C. J. O. Though the defendants acquiesced in the appointment of the plaintiff, there was no acquiescence in the terms of the appointment, and it appeared that their practice was to engage their agents at will only. The power of attorney, if it gave power to appoint sub-agents at all, did not give power to appoint them by the year; and the general agent was not held out by the company as having any such authority. *Howard v. Singer Manufacturing Co.*, 8 A. R. 264.

See also *Falkiner v. Grand Junction Railway Co.*, 4 O. R. 350.

4. Personal Liability of.

Sec. 5 of 16 Vict. c. 241, gives power to the Midland Railway Co., to become parties to bills, and enacts: "Any bill of exchange drawn, accepted, or endorsed by the president of the company, with the countersignature of the secretary of the company, or any two of the directors of the company, and under the authority of a quorum of a majority of the directors, shall be binding upon the company, and every . . . bill of exchange . . . accepted . . . by the president of the company, or any two of the directors as such, with the countersignature of the secretary, shall be presumed to have been properly . . . accepted . . . for the company until the contrary be shewn . . . nor shall the president or directors, of the company so . . . accepting . . . be thereby subjected individually to any liability whatever." A bill of exchange addressed "To the President, Midland Railway, Port Hope," was accepted as follows: "For the Midland Railway of Canada: accepted, H. Read, secretary; Geo. A. Cox, president," the latter being then the president of the company:—Held, per Burton, J.A., and Osler, J.,

affirming the judgment of the Queen's Bench, 44 Q. B. 542, that the defendant Cox was personally liable. Per Patterson and Morrison, J.J.A., that he was not so liable. *Madden v. Cox*, 5 A. R. 473.

One E. advanced \$4,000 to I. & M., on the guaranty of the defendant company, clearly acting ultra vires, who obtained, as security for such guaranty, an order from I. & M., on the water works company, for the amount. I. & M. afterwards induced the defendants to give up the order on replacing it by orders for half the amount. E. recovered judgment by default against the defendants, and by sci. fa. realized the amount of his loan:—Held, affirming the master's report, that B., who was one of the directors of the defendant company, and who had been instrumental in procuring the above guaranty, was properly charged with the amount the defendants had lost through the delivery up of the order on the water works company; but that he was not liable for the balance of the claim of E., since it had been made up to the defendants by the moneys realized on the orders by which the order so delivered up had been replaced. *Walmsley v. Rent Guarantee Co.*, 29 Chy. 484.

5. Other Cases.

An objection was raised to the president of an insurance company acting as such, because he acted as the inspector of the company for which he was paid a salary:—Held, that no weight could be given to it, because three directors formed a quorum of which the president need not be one, and a quorum may have acted without him: and, moreover, for all that appeared it might be that he only received an additional allowance as president while discharging the duties of inspector. *The Victoria Mutual Fire Insurance Co. v. Thompson*, 32 C. P. 476.

In the absence of agreement, there is clearly no duty or obligation on the part of directors to pledge their own credit for the benefit of the company. *Christopher et al. v. Noxon et al.*, 4 O. R., Chy. D. 672.

Where certain shares were allotted to one of the directors of a company at par, in consideration of which he offered to supply funds to meet a pressing demand upon the company, and he voted on these shares at a general meeting of the shareholders, and no opposition was at the time made to his so doing:—Held, that the shareholders, must be considered to have ratified the transfer, and could not afterwards object to it as improper. *Ib.*

It was alleged that he thus acquired such stock in order to obtain control of the company:—Sembles, that this would not be improper, if no improper means were used by him: but that had he made a profit thereby, the company might perhaps have claimed it. *Ib.*

An allotment of shares to a director, if a questionable act, may be ratified by the company, and for this purpose, as for all other acts within the power of the corporation, the approval of a majority of shareholders is sufficient. *Ib.*

See *The Toronto Brewing and Malting Co. v. Blake*, 2 O. R. 175, p. 150.

IV. LIABILITY OF MEMBERS.

In an action brought by McK. under the provisions of the Con. Stat. Can. c. 63, against K. et al., as stockholders of a joint stock company incorporated under said Act, to recover the amount of an unpaid judgment they had obtained against the company, the defendants K. et al., pleaded inter alia that they had paid up their full shares and thereafter and before suit had obtained and registered a certificate to that effect:—Held, affirming the judgment of the Court of Common Pleas, that under ss. 33, 34, and 35, Con. Stat. Can., c. 63, as soon as a shareholder has paid up his full shares and has registered, although not until after the 30 days mentioned in s. 35, a certificate to that effect, his liability to pay any debts of the company then existing or thereafter contracted ceases, excepting always debts to employees, as specially mentioned in s. 36. *Ritchie, C. J.*, and *Fournier, J.* dissenting. *McKenzie v. Kittridge*, 4 S. C. R. 368; 27 C. P. 65; 24 C. P. 1.

V. POWERS OF.

1. Regarding By-laws.

The defendants, a company incorporated under the Ontario Joint Stock Letters Patent Act, R. S. O. c. 150, as amended by 41 Vict. c. 8, s. 16, with a capital stock of \$300,000, in shares of \$1,000 each, acting under sec. 17a of the Act, which authorized the issue of any part of the capital stock as preference shares, passed a by-law in 1877, for the issue of \$75,000 as such preference shares, which were to have preference and priority as respects dividends and otherwise as therein declared, namely: 1. "The company guarantees eight per cent. yearly to the extent of the preference stock, up to the year 1880, and over that amount (eight per cent.) the net dividends will be divided among all the shareholders pro rata." 2. "Should the holders of preference bonds so desire, the company binds itself to take the stock back during the year 1880, at par, with interest at eight per cent. per annum, on receiving six months' notice in writing, &c." The plaintiff subscribed for and was allotted five shares, amounting to \$5,000, which he paid up, but contending that the by-law was ultra vires by reason of the above conditions, and the issue of shares therefore void, brought an action to recover back the money paid therefor:—Held, that the first condition of the by-law was not ultra vires, as its proper construction was, not that the interest was to be paid at all events, and so possibly out of capital, but only if there were profits out of which it could be paid; but that the second condition was ultra vires, for that the Act neither expressly nor impliedly authorized the company to accept a surrender or cancel the shares, repaying the amount thereof:—Held, however, that the plaintiff could not recover, for notwithstanding one or both of the conditions were invalid, the shares themselves were valid, there being authority to issue preference shares, and the plaintiff having subscribed for preference shares, and having got them, he became a shareholder of the company. *Long v. Guelph Lumber Co.*, 31 C. P. 129.

The right to pass by-laws necessarily imports a right to repeal the same, but this cannot be

done to the prejudice of a party who has obtained rights under such by-laws without his assent. Therefore the Church Society of the Diocese of Huron, having received certain moneys, invested the same, and then appointed a committee to consider the future application of the surplus of such fund and on the report of the committee passed a by-law providing that every clergyman of not less than eight years' active service in the diocese, who was not under ecclesiastical censure, not on the Commutation Fund, and not in receipt of any salary, should be entitled to \$200 a year. Under such by-law the plaintiff was placed on the list of clergymen entitled to such allowance of \$200 from the surplus interest of such fund, and for some time received it, and the defendants, under an Act of the Legislature, succeeded the Church Society:—Held, that the plaintiff had a vested interest in such surplus interest of which he could not be deprived, so long as he came within the provisions of the by-law under which he had been placed on such list; and a subsequent by-law repealing all former by-laws, and declaring that all former grants made in pursuance of prior by-laws should cease, could not affect such vested rights of the plaintiff. *Wright v. The Incorporated Synod of the Diocese of Huron*, 29 Chy. 348. Reversed in appeal. See 20 C. L. J. 146.

See *Page et al. v. Austin*, 7 A. R. 1, p. 135. See also *Falkner v. Grand Junction Railway Co.*, 4 O. R. 350.

2. Changing Head Office.

The Act incorporating a company provided that the head office might be changed from Ottawa to such other place as might be determined by the shareholders at any one of the general meetings. At the general annual meeting a resolution was passed authorizing the directors to consummate arrangements for the removal of the head office from Ottawa to Toronto. The directors made the change, and the subsequent annual meetings were held at Toronto, at the first of which so held, the by-law referring to the place of holding the annual meetings was amended by substituting Toronto for Ottawa:—Held, that the change was effectually made. *The Union Fire Ins. Co. v. O'Gara*; *Same Plaintiffs v. Shoolbred*, 4 O. R., C. P. D. 359.

3. Expulsion of Members.

By one of the by-laws of the defendants' association they were empowered to expel any member for refusing to submit a question arising between members to arbitration, but it was provided that such expulsion should take place only after the case should have been submitted to a meeting of the association, due notice having first been given to the parties that such a meeting would be held. M. & Co., members of the association, had a claim against the plaintiff, who was also a member, consisting of three items \$1.06 for balance of purchase money of grain; \$3.97 for freight on same grain which they had paid under protest, and a sum for costs incurred in an action brought by them to recover back the freight so paid. The plaintiff paid the first item, but disputed the balance of the account, whereupon M. & Co. applied for and obtained a reso-

lution by defendants that there should be an arbitration, to which the plaintiff submitted, and he afterwards admitted his liability for the amount claimed for freight, and offered his note at twelve months for it, which W. & Co. declined. Upon a submission, however, being tendered him covering the three items, he refused to sign it as the first two items were no longer in dispute. In consequence of his refusal, the defendants expelled him at a meeting called "to receive a report from the committee, regarding the conduct of a member."—Held, affirming the decree of Proudfoot, V. C., 27 Chy. 23, that the plaintiff was improperly expelled, and was entitled to be reinstated in his rights of membership. Per Burton and Patterson, J.J. A., that there had been no refusal to arbitrate within the meaning of the by-law, but only a refusal to arbitrate upon a matter not in dispute. *Cannon v. The Toronto Corn Exchange*, 5 A. R. 268.

Per Galt, J., that the notice of the meeting at which the expulsion took place was not a sufficient compliance with the provision which required that the object of the meeting should be specially stated. *Ib.*

Where a member of a college council complains that he has been improperly expelled from the council, the Court of Chancery, under the Administration of Justice Act, has jurisdiction in a proper case to decree relief, that Act giving jurisdiction to the Court of Chancery "in all matters which would be cognizable in a court of law;" although the remedy in such a case in a court of law would be sought by mandamus. *Marsh v. Huron College*, 27 Chy. 605.

One of the by-laws of an incorporated college provided, amongst other things, that special meetings of the council might be convened as the president should deem necessary, or upon the requisition of any three members of the council, the notices of which special meetings should specify the business to be brought forward, and that no business should be introduced at any special meeting in addition to that specified in the notice. The plaintiff, as one of the members of the council, having acted in such a manner as in the opinion of the president merited his dismissal or expulsion from the body, a meeting for that purpose was ordered to be convened by the president, and notices were accordingly sent to all the members of the council stating that a meeting would be held "for special business," but omitting to say what such special business was. At the meeting so called, at which the plaintiff was present, a resolution was unanimously adopted, by the other members of the council present, expelling the plaintiff from the council:—Held, that the notice calling such meeting was invalid, because it did not specify the business intended to be brought before the council; and a decree was pronounced declaring that such resolution of expulsion had been illegally and improperly passed, and that the plaintiff continued to be and was a member of the council. But the court [Spragge, C.] being of opinion that the plaintiff had wittingly and designedly left the members of the council under a false impression, as to his conduct in regard to the matters which had been the subject of enquiry before the council—if he did not designedly produce such impression—refused the plaintiff the costs of the proceedings. *Ib.*

The fact that the plaintiff had attended a meeting which had been illegally called, and had entered upon a defence before the council, did not prevent his afterwards filing a bill impeaching the proceedings as irregular and invalid. *Ib.*

The wrong (if any) complained of being a personal wrong on the part of the members of the council who voted for the resolution:—Quære, if costs were adjudged to the plaintiff, whether they should not be paid by those members. *Ib.*

The reasons for which alone members of a municipal body may be disfranchised, do not apply to the members of the governing body of an educational institution whether incorporated or not. *Ib.*

Quære, what would form a sufficient ground for the expulsion of a member of such a body as the council of Huron college. *Ib.*

Members of charitable and provident societies should not be allowed to litigate their grievances in courts of law until they have exhausted every possible means of redress afforded by the internal regulations of their societies. Therefore, where the plaintiff being expelled from the Ancient Order of Foresters, filed his bill for restitution thereto on the ground of illegal expulsion, but it appeared that the rules of the society provided certain internal tribunals to which he might have appealed for redress, but had not, this court refused to interfere. *Essery v. Court Pride of the Dominion*, 2 O. R., Chy. D. 596.

See *L'Union St. Joseph de Montreal v. Lapierre*, 4 S. C. R. 154, p. 177.

4. Other Cases.

Held, that the directors of a Mutual Insurance Co. may under R. S. O. c. 161, s. 29, borrow money on promissory notes or debentures without passing a by-law under seal. *The Victoria Mutual Fire Ins. Co. v. Thompson*, 32 C. P. 476.

An incorporated company, by its charter, was authorized to carry on business in the management of real and personal property; guarantee rents thereof; to collect rents, &c.; procure loans, and to negotiate the sale and purchase of houses, mortgages, stocks, and other securities, "and generally to transact every description of commission and agency business, except the business of banking, and the issue of paper money or insurance."—Held, that this did not confer any power upon the company to discount notes guaranteed by their endorsement; neither had they the right to speculate in the purchase of mortgage or other securities, although they might have been justified in investing any surplus capital or accumulation of profits until the same was required. *Walmsley v. Rent Guarantee Co.*, 29 Chy. 484.

See *Falkiner v. Grand Junction R. W. Co.*, 4 O. R. 350.

VI. CONDUCT OF BUSINESS.

Seemle, that the amendment at page 362, of the report of this case, being to strike out a certain canon and substitute another for it, though moved as an amendment to a proposed amendment of such canon, was rather a substantive

motion and should have been brought before the Synod through the standing committee. *Wright v. The Incorporated Synod of the Diocese of Huron*, 29 Chy. 348; reversed in appeal. See 20 C. L. J. 146.

See *Christopher et al v. Noxon et al.*, 4 O. R. 672, p. 140.

VII. CONTRACTS BY AND WITH CORPORATIONS.

1. Contracts not under Seal.

To a declaration alleging that the plaintiffs entered into an agreement with the defendants to perform certain stone work, which they partly performed, and averring as a breach that the defendants had prevented them from carrying out and completing the work, whereby, &c., the defendants pleaded the plaintiffs were an association incorporated under R. S. O. c. 158, and that the agreement was not under the plaintiffs' seal:—Held, on demurrer that the plaintiffs being a trading corporation, enough was not shown to make the absence of a seal fatal to the validity of the agreement. *The Ontario Co-operative Stone Cutters' Association v. Clarke et al.*, 31 C. P. 280.

The plaintiffs were a company incorporated under C. S. C. c. 63, and 24 Vict. c. 19, for the manufacture and sale of cheese, &c. On the 10th of August, 1878, a written agreement was entered into between one C., the plaintiffs' secretary and salesman, and one M., on behalf, as was stated, of the plaintiffs and defendants respectively, and which was signed by C. and M., for the sale of the whole of the plaintiffs' July cheese, as also of their August, September, and October cheese, at prices named:—Held, that the plaintiffs being a trading corporation, and the contract one specially relating to the objects and purposes of the company, it was binding upon them, though not under seal. *Albert Cheese Company v. Leeming et al.*, 31 C. P. 272.

The defendants agreed, subject to certain tests and approval, to purchase from the plaintiffs a steam fire engine, which it appeared it was desirable the municipality should possess; but on submitting a by-law for that purpose to the ratepayers for approval, the same was rejected, although an informal by-law had been previously approved of by them. Meanwhile the engine had been received by the defendants, and by them subjected to the necessary tests, which being satisfactory they, by a minute in council, agreed to accept the engine, and the same was placed in their engine-house, subject to the customs duties thereon. A few days after, on ascertaining the result of the voting, the defendants communicated the same to the plaintiffs, rescinded the resolution, and requested them to remove the engine, which the plaintiffs declined to do, and sued for the price of the engine:—Held, (affirming the judgment of the court below, 31 C. P. 301) that the plaintiffs were not entitled to recover; the contract for the purchase of the engine not having been under seal, and there having been no formal acceptance of it under seal; and the purchase thereof not being a matter of such minor importance or daily occurrence as should be binding on the corporation without the formality of a seal. *Silsby v. The Corporation of the Village of Dunnville*, 8 A. R. 524.

Quære, whether the defendants would necessarily be liable upon a contract not under seal even where the benefit of it had been actually enjoyed, unless in cases where the thing ordered was actually and urgently required, or "for work which if the corporation had not ordered, they would not have done their duty." *Pim v. The Municipal Council of Ontario*, 9 C. P. 304; remarked upon. *Ib.*

Semble, that a contract made verbally with the president of defendant's company with the plaintiff engaging him for "the season," that is early in May, until sometime in November, as master, to manage a steamer, might be binding, and that a nonsuit for the want of a corporate seal was properly set aside. *Ellis v. The Midland R. W. Co.*, 7 A. R. 464.

Held, affirming the judgment of the court of appeal that the setting up of "the want of a seal" as a defence to an action on an assurance policy which had been treated by all parties as a valid policy was a fraud which a court of equity could not refuse to interfere to prevent, without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears; and, therefore, the respondent was entitled to the relief prayed, as founded on the facts alleged in her equitable replication. *The London Life Assurance Co. v. Wright*, 5 S. C. R. 466; 5 A. R. 218; 29 C. P. 221.

D., on the suggestion of R. and the Bank of O., that he should purchase certain lumber held by the bank as security for advances made to R., required a guarantee from the bank that the lumber should be satisfactorily culled and any deficiency paid for by the bank. The directors of the bank thereupon resolved to submit the lumber to a culler, and if he reported satisfactorily, to give the guarantee. Their local agent, however, with the approbation of their head manager, without previously employing a culler to report, gave a guarantee in writing, but not under seal, "on behalf of the bank," that the lumber should be satisfactorily culled previously to shipment:—Held, that the bank was liable on the guarantee for any deficiency resulting from unsatisfactory culling, for the plaintiffs were warranted in assuming that the agent giving it had the necessary authority, and no seal was required, and if the bank wished to repudiate it they should repay the money paid to them by D., for the lumber. *Dobell et al. v. The Ontario Bank et al.*, 3 O. R., Chy. D. 299. Reversed on appeal. See 20 C. L. J. 144.

See *Cleaver v. The North of Scotland Canadian Mortgage Co.*, 27 Chy. 508.

2. Other Cases.

A company receiving money on deposit, which is placed to its credit at a bank, is liable for the money so received, though the taking of money by deposit be ultra vires; and if the officers of the company use such moneys in other ultra vires transactions, that may be a proper matter for the shareholders to charge those officers with, but it is not one with which the depositor has anything to do. *Walmsley v. Rent Guarantee Co.*, 29 Chy. 484.

As to rescinding contracts for shares on the ground of fraudulent representation and conceal-

ment. See *Petrie v. Guelph Lumber Co. et al.*, and two other cases, 2 O. R. 210.

See *Long v. Guelph Lumber Co.*, 31 C. P. 129, p. 144. See also *Murray et al. v. The Canada Central R. W. Co.*, 7 A. R. 646; *Real Estate Investment Company v. The Metropolitan Building Society*, 3 O. R. 476.

VIII. ACTIONS AND PROCEEDINGS BY AND AGAINST.

1. Generally.

In these cases which were actions for calls on stock, an objection was taken that there was no power to sue, because the company's license under 42 Vict. c. 25, O., had been revoked, but it was shewn that one B. had been appointed receiver, and was specially required by order of the chancery division to prosecute all members in arrear for calls; and that he had adopted these actions, and was prosecuting them as receiver:—Held, that the objection was not tenable. *The Union Fire Ins. Co. v. Fitzsimmons et al.*, and another case 32 C. P. 602.

An order for security for costs cannot be obtained under R. S. O. c. 51, s. 71, upon an affidavit made by the defendants' attorney. That section requires the affidavit to be made by the defendant personally. An application made upon the affidavit of the solicitor of the defendants, a corporation, was therefore refused. *Martin q. t. v. The Consolidated Bank*, 45 Q. B. 163.

Where certain shareholders in a company joined with the company as plaintiffs, as a precautionary measure merely in case it should transpire that their co-plaintiffs, the company, were not entitled or unwilling to sue, the court (Blake, V. C.) refused to allow a demurrer for want of equity, as the objection was purely of a formal nature. *The City Light & Heating Co. of London, et al v. Macfie et al*, 28 Chy. 363.

A demurrer to a bill filed by shareholders of an incorporated company, on behalf of themselves and all other shareholders except the defendants, in which the company were joined as co-plaintiffs, attacking a transaction whereby all the shareholders including some of those whom the plaintiffs, assumed to represent, received shares in the transaction sought to be impeached, was allowed. *Ib.*

The court may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed. Where there are conflicting claimants to the position of president of a company, and one claimant takes forcible possession of the company's premises, the other claimant, at all events when he is at the time the acting president, can bring an action to restrain him in the name of the company, though it be uncertain who is the rightful president. *The Toronto Brewing and Malting Co. v. Blake*, 2 O. R., Chy. D. 175.

See *McSherry v. The Commissioners of the Cobourg Town Trust*, 45 Q. B. 250, p. 133; *Provincial Ins. Co. v. Cameron*, 31 C. P. 523, p. 137; *Walmsley v. Rent Guarantee Co.*, 29 Chy. 484, p. 147; *Christopher et al. v. Noxon et al.*, 4 O. R. 672, p. 138.

IX. WINDING UP ACT.

An appeal under the Act respecting the winding up of Joint Stock Companies, 41 Vict. c. 5, s. 27, O., cannot be entertained when security has not been given within eight days from the rendering of the final order or judgment appealed from. Where a bond good in form with proper sureties was filed with the clerk of the County Court, on the last of the eight days, though not allowed by the Judge:—Held, to be within the words, "given security before a Judge," and a sufficient compliance with the Act, though a person thus filing a bond without allowance risks being deprived of his right of appeal in the event of the bond proving defective. *Re Union Fire Ins. Co.* 7 A.R. 783.

The Act applies to an Insurance Company incorporated by the Province of Ontario, notwithstanding that R. S. O., c. 160, provides a separate mode of distributing the deposit made by the company with the Provincial Treasurer. An order for compulsory winding up, may be made under section 5, notwithstanding a resolution had been passed by the shareholders of the company, providing for the voluntary winding up of the affairs thereof under the supervision of the directors of the company, and a committee of shareholders appointed by them for that purpose. This not being an extraordinary resolution under sec. 4, sub-s. 3, under the circumstances appearing in the judgment:—Held, that the discretion of the judge appealed from had not been improperly exercised *Ib.*

X. FOREIGN CORPORATION.

Held, that Ontario Bank shares, though subscribed for at Montreal and at one time registered there, but transferred to Bowmanville during the testator's lifetime, and appearing in the stock register there only, were Ontario assets. *Bloomfield v. Brooke*, 8 P. R. 266.—Taylor, Master.

Liability of foreign corporations to municipal assessment. See *In re North of Scotland Canadian Mortgage Co.*, 31 C. P. 552.

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See EVIDENCE.

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5. *Preliminary Examination of Parties*
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6. *Setting Aside Fraudulent Conveyances*
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7. *Injunction*—See INJUNCTION.
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XIII. IN PARTICULAR ACTIONS OR SUITS.

1. *Administration Suits*—See EXECUTORS
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2. *Alimony*—See HUSBAND AND WIFE.
3. *Ejectment*—See EJECTMENT.
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5. *Specific Performance*—See SPECIFIC
PERFORMANCE.

XIV. LIEN OF ATTORNEY FOR COSTS—See ATTORNEY AND SOLICITOR.

II. SECURITY FOR COSTS.

1. When Ordered.

(a) Residents abroad and Foreigners in Ontario.

Where a plaintiff resident without the jurisdiction wilfully stated in his bill that he resided within it, security for costs was ordered. A subsequent application to rescind the order on the ground that the plaintiff had returned within the jurisdiction and intended to remain there at the time of the former application, but had not then shewn the facts fully, was granted, but on appeal this order was reversed, and the order for security directed to stand. *Sutherland v. McDonald*, 9 P. R. 178.—Stephens, Referee.—Boyd.

Semble, that security will not be ordered, even where the plaintiff is a foreigner who has come within the jurisdiction temporarily, and only for the purpose of maintaining the suit. *Ib.*

Where a plaintiff who resided out of the jurisdiction did not endorse his place of residence on the writ, the costs of an application for security were made costs to the defendant in the cause. *McCready v. Hennessy*, 9 P. R. 489.—Dalton, Master.

The right to security for costs under rule 431, O. J. Act, is absolute, where the plaintiff resides out of Ontario, and it is immaterial that the defendant has no defence upon the merits. *The Bank of Nova Scotia v. LaRoche, et al.*, 9 P. R. 503.—Cameron.

The order is a stay of proceedings, and a judge has no power to set it aside when once properly issued and sign final judgment under rule 80, O. J. Act. *Ib.*

Quære, as to the proper time for making application for such security. *Ib.*

(b) Costs of Former Suit unpaid.

The plaintiff filed a bill against B. and his daughter, alleging that he had been induced by the false representations of defendants to marry the daughter, upon the supposition that her husband was dead, whereas he was alive: that the plaintiff was induced by B. to expend money on property, which B. was to convey to the plaintiff, and his supposed wife, who afterwards left the plaintiff, and the plaintiff claimed a lien upon and sale of the property to repay his said expenditure thereon. This bill having been dismissed for want of prosecution, the plaintiff sued the executor of B. who had died, setting out his expenditure under the false representations, and alleging that after his supposed wife had left him B. agreed, that upon receiving three years rent of the property which was under lease, he would convey it to the plaintiff, and praying for specific performance:—Held, that the second suit was not for substantially the same cause as the first, and that defendant therein was not entitled to security for costs. *Caswell v. Murray et al.*, 9 P. R. 192.—Dalton, Master, Boyd.

(c) Bankruptcy and Insolvency.

An assignee in insolvency bona fide suing in discharge of his duty as such assignee, will not be required to give security for costs on the ground that he is without means, and not beneficially interested in the suit. *Vars v. Goukl*, 8 P. R., 31.—Stephens, Referee.

Where it appeared that a large number of persons had an interest in the settlement of the question involved in the suit, and they put forward as plaintiff in the suit one of their number, who was shewn to have been insolvent some years before the commencement of the suit, and did not appear to have accumulated any property since his insolvency, security for costs was ordered. *Hathaway v. Doig*, 9 P. R. 91.—Ferguson.

See *Robertson v. McMaster*, 8 P. R. 14, p. 155.

(d) In Division Courts.

Under R. S. O., c. 47 sec. 244, an order for security for costs may be made in a Division Court. *Re Fletcher and Noble*, 9 P. R. 255.—Cameron.

(e) In Exchequer Court.

Where, by a letter addressed to the suppliant, the secretary of the public works department stated, that he was desired by the minister of public works to offer the sum of \$3,950 in full settlement of the suppliant's claim against the department, an application on behalf of the Crown for security for costs was refused, on the ground that the power of ordering a party to give security for costs, being a matter of discretion and not of absolute right, the Crown in this.

case could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application. Application for security for costs in this Court must be made within the time allowed for filing statement in defence, except under special circumstances. *Wood v. The Queen*, 7 S. C. R. 631.

(f) Further Security.

The usual præcipe order for security for costs had been taken out by the defendant and duly complied with by the plaintiff. Subsequently the cause was partially heard before Ferguson, J., but was adjourned for three months owing to the Judge being required to open another sittings of the Court. The defendant thereupon, seeing that the costs far exceeded the security given, applied for an order for further security. It was not shewn that the defendants could not have foreseen that the \$400 would not cover the costs. Boyd, C., affirmed the judgment of Mr. Stephens, refusing further security. *Bell v. Landon*, 9 P. R. 100.

See S. C., pp. 161, 162.

2. Practice in Moving for.

(a) Time for applying.

A motion for security for costs may be made at any time before issue is joined. *Caswell v. Murray*, 9 P. R. 192.—Dalton, Master, Boyd.

See *The Bank of Nova Scotia v. La Roche, et al.*, 9 P. R. 503, p. 154.

(b) Affidavit.

An order for security for costs cannot be obtained under sec. 71 of the Common Law Procedure Act, R.S.O., c. 50, upon an affidavit made by defendant's attorney. That section requires the affidavit to be made by the defendant personally. An application made upon the affidavit of the solicitor of defendants, a corporation, was therefore refused. *Martin qui tam v. The Consolidated Bank*, 45 Q. B. 163.

3. Putting in Security.

It is not essential that a bond for security for costs should be by more than one obligor, if otherwise sufficient. *Fletcher v. Noble*, 9 P. R. 534.—Cameron.

4. Waiver of Right to.

The defendant was aware of the insolvency of the plaintiff before the action was commenced, but did not apply for security for costs until after issue was joined, alleging that he was not before aware that the plaintiff had not obtained his discharge:—Held, that the defendant had waived his right to security. *Robertson v. McMaster*, 8 P. R. 14.—Dalton, Master.

A petition by the defendant to reduce the amount of alimony allowed in the suit, came on to be heard on the 5th of October, when counsel for the plaintiff appeared and procured an enlargement for two weeks to answer the defend-

ants affidavits, and on the same day demanded and received copies of them. On the 19th October, the counsel appeared and obtained a further enlargement for two weeks, but before the time expired applied for an order for security for costs, on the grounds stated in the report:—Held, without expressing an opinion on the merits, that the plaintiff had waived her right, if any, to such security. *Knowlton v. Knowlton*, 8 P. R. 400.—Stephens, Referee, Proudfoot.

The defendant demanded copies of affidavits to be used on an injunction motion, and subsequently obtained an enlargement of the motion:—Held, not a waiver of his right to security for costs, because the facts on which to base such motion for security were unknown to him at the time of the demand and enlargement. *Hathaway v. Doig*, 9 P. R. 91.—Ferguson.

5. Payment out of Court pending Appeal.

Plaintiffs, who resided in England, obtained a verdict for the price of goods in defendants' possession. The defendants appealed to the Court of Appeal. Plaintiffs applied for payment out of \$300 paid in by them as security for costs on commencing the action:—Held, that as the plaintiffs were shewn to have goods in the country, and in the defendants' possession, the \$300 should be paid out. But for this the plaintiffs would not have been entitled to the money, the appeal being a step in the original cause, not a new action. *Napier et al. v. Hughes et al.*, 9 P. R. 164.—Wilson.

Money paid into court in lieu of giving the usual bond for security for costs will not be paid out to the party paying it in, in whose favour a decree has been made, pending an appeal to the Court of Appeal. *National Ins. Co. v. Egleson*, 9 P. R. 202.—Boyd.

III. COSTS OF THE DAY.

The practice of giving costs of the day is superseded by the O. J. Act. No officer of the Court has now power to issue a rule for such costs. Where the plaintiff fails to enter the cause, defendant should apply to a judge under rule 264. The Master in Chambers has no jurisdiction to entertain an application for costs under that rule. *Hopkins v. Smith*, 9 P. R. 285.—Dalton, Master.

IV. APPLICATION FOR FULL COSTS.

The plaintiff sued the defendant on a foreign judgment for \$240, and specially endorsed this amount upon the writ of summons. He obtained judgment in default of appearance:—Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O. c. 50, s. 153, and that the plaintiff was entitled to Superior Court costs. *Davidson v. Cameron*, 8 P. R. 61.—Dalton, Q. C.

Where a cause was properly within the equity jurisdiction of a County Court but the defendants resided in a different county from that in which the land in question was situated, the costs were ordered to be taxed on the higher scale. *Double-dee v. Credit Valley R. W. Co.* 8 P. R. 416.—Taylor, Master.

The plaintiff was entitled to the lateral support of the defendants' land, in which they made excavations for the purposes of a rink, whereby the plaintiffs' land was damaged. The damages were assessed at \$40, but judgment was given for the restoration of the plaintiff's land:—Held, that the plaintiff was entitled to full costs. *Snarr v. The Granite Curling and Skating Co.*, 1 O. R., Chy. D. 102.

The plaintiff and defendant entered into partnership to furnish G. & W. with certain staves for the price of \$2,000. The contract was not fulfilled, and the plaintiff subsequently brought an action and obtained a reference to take an account of the partnership dealings. The report found that the plaintiff had contributed to the partnership capital \$87.39, and the defendant \$233.89, and that there was due from the defendant to the plaintiff \$43.74. The taxing officer taxed the plaintiff's costs under the lower scale, on the ground that the case came within C. S. U. C. c. 15, s. 34, sub-s. 1. On appeal, Cameron, J., reversed the taxing officer's ruling. *Blaney v. McGrath*, 9 P. R. 417.

In interpleader issues. See *Masuret v. Lansdell*, 8 P. R. 57; *Phipps v. Beamer*, 8 P. R. 181; *Beaty v. Bryce*, 9 P. R. 320; *Arkell et al v. Geiger*, 9 P. R. 523; *Christie v. Conway et al.*, 9 P. R. 529.

V. WHERE PARTY HAS SUCCEEDED ONLY IN PART.

The plaintiff by his bill did not submit to do what he was bound to do as the price of the relief asked; and the defendant asked relief which the court could not grant. The Court, on pronouncing a decree, refused costs to either party. *Clemow v. Booth*, 27 Chy. 15.

The court refused in this case to reform an instrument on parol evidence, although satisfied that the plaintiffs ought to have succeeded had the case been one depending on the weight due to such evidence, and had the bill only asked for that relief would have dismissed it with costs; but as the bill contained a prayer for foreclosure, that relief was afforded the plaintiffs, subject to the payment of such costs as the defendant, an assignee in insolvency, had incurred in resisting a rectification of the mortgage. *Dominion Loan & Savings Society v. Darling*, 27 Chy. 68.

In a suit seeking to restrain the use by defendant of an oven, which had been the subject of a patent in favour of the plaintiff, the plaintiff having succeeded in part only of his claim, no costs were given to either party up to the hearing. A reference as to damages having been directed, subsequent costs were ordered to abide the result. *Hunter v. Carrick*, 28 Chy. 489.

Where the defendant, who had covenanted that only \$664 was due on a mortgage held by a building society on property purchased by plaintiff, and his answer admitted an error in the computation of the amount due to the society, and offered to pay the difference between the \$664 and what he alleged was the cash value of the mortgage and costs up to that time:—Held, that in the event of the society accepting present payment of the cash value, the defendant was entitled to his costs of suit, subsequent to answer. *Stark v. Shepherd*, 29 Chy. 316.

Where a mortgagee claimed all the goods seized by a sheriff under execution, but it appeared on the trial of an interpleader issue between the mortgagee and the execution creditors that some of the goods seized amounting to one sixth of total value were not covered by the mortgage:—Sensible, although the mortgagee was entitled to the general costs of the issue a deduction of one-sixth should be made in respect of the goods as to which he failed. *Segsworth v. Meriden Silver Plating Co.*, 3 O. R., Chy. D., 413.

Held, in this case, that the demurrer being partially successful and partially unsuccessful, neither party should get costs. *Attorney General v. Midland R. W. Co.*, 3 O. R. 511.

See *Clark v. Creighton et al.*, 9 P. R. 125, p. 163; *Porritt v. Fraser*, 8 P. R. 430, p. 52.

VI. UNNECESSARY OR VEXATIOUS PROCEEDINGS.

A summons for a writ of prohibition to a division court was made absolute without costs, there being no meritorious defence. *Kinsey v. Roche*, 8 P. R. 572.—Osler.

Where a County Court Judge improperly refuses to hear the argument of a rule nisi, mandamus is the proper remedy; and where the refusal to hear had been caused by an unmeritorious objection deliberately taken and insisted upon by defendant, he was ordered to pay the costs of the application for mandamus. *In re Dean v. Chamberlin*, 8 P. R. 303.—Osler.

A count having been drawn so as to invite a demurrer, the demurrer was overruled without costs. *Smith v. Corporation of Ancaster Township*, 45 Q. B. 86.

Where, the plaintiff's own negligence was the occasion of the litigation between the plaintiff and F. M., one of the defendants, costs were not allowed to either party, either in the Court of Appeal or the Court below, up to the decree. Blake, V.C. dissenting, holding, that as the litigation was caused by J. M. the costs should be borne by him. *Campbell v. McDougall, et al.*, 5 A. R. 503.

In a suit instituted to compel payment of an insurance, the company raised the defence of ultra vires, which the court (Spragge, C.) sustained and dismissed the bill, but refused the company their costs of suit, as in opposing the plaintiff's claim they were resisting upon inequitable grounds the payment of a just debt. *Lawson v. Canada Farmers' Ins. Co.*, 28 Chy. 525.

It not appearing that there was any good reason for filing a bill instead of proceeding to enforce an award in the usual way, the court (Spragge, C.) refused to the plaintiff any costs other than such as he would have been entitled to had he proceeded to enforce the award under the statute. *Moore v. Buckner*, 28 Chy. 606.

When it appeared that administration proceedings had been instituted without any shew of reason, or proper foundation for the benefit of the estate, and that they had not, in their results, conducted to that benefit, the decision of Proudfoot, J., ordering the plaintiff to pay the costs of all parties, was affirmed in appeal. *Re Woodhall—Garbutt v. Hewson et al.*, 2 O. R., Chy. D. 456.

See *In re Flint and Jellett*, 8 P. R. 361, p. 41. See also *McCardle v. Moore et al.*, 2 O. R. 229; *Merchants' Bank v. Sparkes*, 28 Chy. 108; *Simpson v. Horne*, 28 Chy. 1; *Purdy v. Park*, 9 P. R. 424.

VII. ALLEGATIONS NOT ESTABLISHED.

Where one of several persons beneficially interested under the will of a testator, without making proper inquiries into the conduct and dealings with the estate by the executors, instituted proceedings against them, and groundlessly charged them with misconduct, causing thereby much unnecessary costs and trouble, the court being satisfied with the conduct of the executors, refused to take the further administration and winding up of the estate out of their hands; and it being shewn that all the other persons interested in the estate were satisfied with the conduct of the executors, ordered the plaintiff to pay the costs of the suit. *Rosebatch v. Parry*, 27 Chy. 193.

The plaintiff claimed to be a creditor of O., and as such filed a bill alleging that O. was mortgagee or otherwise entitled to some interest in the lands of M., and that O. was about to dispose of his interest therein in order to defeat the claim of the plaintiff, and prayed an account of what was due by O., and to restrain M. from paying O., and also an order for M. to pay plaintiff. At the hearing, the court (Spragge, C.) made a decree referring it to the master to ascertain what was due by O. to the plaintiff, and if anything found due that O. should be ordered to pay the amount due to the plaintiff, with costs; but dismissed the bill as against M., with costs. *Menzies v. Ogilvie*, 27 Chy. 456.

The plaintiff transferred a covenant for the payment of \$4,000, executed by four persons in his favour to the defendant by an absolute assignment, as security for \$2,000; the defendant giving to the plaintiff a separate agreement, to "re-assign" on payment of the loan and interest. On a bill to obtain a reassignment alleging that such loan had been repaid, the court (Spragge, C.) made a decree for redemption in favour of the plaintiff with costs; the defendant having set up a claim to be entitled to hold the security as absolute purchaser thereof. *Livingston v. Wood*, 27 Chy. 515.

On a bill filed by W. against T. and his sister, charging them with conspiracy, and impeaching the deed on the ground of fraud and undue influence, the court (Spragge, C.) although satisfied that no fraud or undue influence had been practised on the grantor, set aside the deed as the same had been executed without proper advice, but refused the plaintiff costs in consequence of the unfounded charges of fraud contained in the bill: and as against the female defendant dismissed the bill, with costs; the fact that the court was of opinion that if the fullest explanations had been given to the father of the nature and effect of his deed he would still have executed it, making no difference in that respect as to what was required on the part of a voluntary grantee, which T. in effect was. *Lavin v. Lavin*, 27 Chy. 567; 7 A. R. 197; followed in *Irwin v. Young*, 28 Chy. 571.

When the defendant having denied the agreement to convey, which however was clearly estab-

lished by his own evidence, *Blake, V. C.*, on dismissing the bill refused to give the defendant his costs. *Ferguson v. Ferguson*, 28 Chy. 380.

The mortgagee at whose instance the sale had been effected having been made a defendant to the bill and charges made of his having combined with the agent to defraud the principal, all of which were negatived, the bill as against him, was dismissed with costs. *Thompson v. Holman*, 28 Chy. 35.

In a suit to set aside a conveyance on the ground of want of consideration, it was alleged that the grantor was bodily and mentally infirm, but the evidence shewed that the only difference between the grantor and grantee was, that the former was an older man than the other. The grantee, however, had given about the full market value of the land conveyed, and to secure part of the purchase money had executed a mortgage thereon. In dismissing the bill, the court (Ferguson, J.) directed the costs of the defendant to be deducted from the amount due under the mortgage, if the costs were not paid within a month, it being alleged that the next friend of the plaintiff was worthless. *Travis v. Bell*, 29 Chy. 150.

Fraud having been charged against a defendant who was a solicitor, and the charge being wholly unsupported:—Semble, that it would have been proper not merely to deprive the plaintiff of her costs but to allow such defendant all his costs. *Freed v. Orr, et al.*, 6 A. R. 690.

Remarks as to the unnecessary introduction of personal charges and assertions of motives in resisting the applications in this case and costs refused in dismissing it. *In re Stanton and the Board of Audit of the County of Elgin*, 3 O. R., C. P. D. 86.

See *Platt v. Blizzard*, 29 Chy. 46.

IX. SET-OFF OF COSTS.

In an action in a County Court, tried by a judge without a jury, judgment was given for \$36, no order being made as to costs:—Held, that no costs could be awarded, and a mandamus was granted to the county court clerk to enter up judgment for the plaintiff with costs, and without allowing defendant to set off against the judgment the difference between County and Division court costs. *Re Great Western Advertising Co. v. Rainer*, 9 P. R. 494.—Armour.

The costs of a motion in term are interlocutory costs, and the party to whom they are awarded is entitled to have them set off against the judgment of the opposite party obtained in the same cause. *Young v. Hobson*, 8 P. R. 253.—Osler.

Held, also, that the costs of a motion made after judgment might be treated as interlocutory, for the purposes of a set-off under Reg. Gen. 52. *Ib.*

X. TAXATION OF COSTS.

1. Costs allowed.

(a) Counsel Fee.

Where evidence taken before the Master sitting for a Judge was entered in the decree as having been taken in court, the same fees were

taxed to counsel before the Master as before a Judge. *Rae v. Trim*, 8 P. R. 405.—Taylor, *Master*.

On an application for further security for costs a counsel fee of \$10 was allowed. *Bell v. Landon*, 9 P. R. 100.—Boyd.

Held, that the Master had properly allowed to defendant, in his accounts, a fee of \$10 paid by him to counsel for advice as to his action in respect of two assignments of a policy of insurance. *Hayes v. Hayes*, 29 Chy. 90.

The suppliant, an advocate of the Province of Quebec, and one of Her Majesty's counsel, was retained by the Government of Canada as one of the counsel for Great Britain before the Fishery Commission, which sat at Halifax pursuant to the Treaty of Washington. There was contradictory evidence as to the terms of the retainer, but the learned judge in the Exchequer Court found "that each of the counsel engaged was to receive a refresher equal to the retaining fee of \$1,000, that they were to be at liberty to draw on a bank at Halifax for \$1,000 a month during the sittings of the Commission, that the expenses of the suppliant and his family were to be paid, and that the final amount of fees was to remain unsettled until after the award." The amount awarded by the Commissioners was \$5,500,000. The suppliant claimed \$10,000 as his remuneration, in addition to \$8,000 already received by him:—Held, per Fournier, Henry, and Taschereau, JJ., that the suppliant, under the agreement entered into with the Crown, was entitled to sue by petition of right for a reasonable sum in addition to the amount paid him, and that \$8,000 awarded him in the Exchequer Court was a reasonable sum. Per Fournier, Henry, Taschereau, and Gwynne, JJ.: By the law of the Province of Quebec, counsel and advocates can recover for fees stipulated for by an express agreement. Per Fournier and Henry, JJ.: By the law also of the Province of Ontario, counsel can recover for such fees. Per Strong, J.: The terms of the agreement, as established by the evidence, shewed (in addition to an express agreement to pay the suppliant's expenses) only an honorary and gratuitous undertaking on the part of the Crown to give additional remuneration for fees beyond the amount of fees paid, which undertaking is not only no foundation for an action but excludes any right of action as upon an implied contract to pay the reasonable value of the services rendered; and the suppliant could therefore recover only his expenses in addition to the amount so paid. Per Ritchie, C.J.: As the agreement between the suppliant and the Minister of Marine and Fisheries, on behalf of Her Majesty, was made at Ottawa, in Ontario, for services to be performed at Halifax, in Nova Scotia, it was not subject to the law of Quebec: that in neither Ontario nor Nova Scotia could a barrister maintain an action for fees, and therefore that the petition would not lie. Per Gwynne, J.: By the Petition of Right Act, s. 8, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances. By the laws in force there prior to 23 and 24 Vict., c. 34, (Imp.), counsel could not, at any time, in England, have enforced payment of counsel fees by the Crown, and therefore the suppliant should not recover. *The Queen v. Doutré*, 6 S. C. R. 342.

(b) Costs in the Cause.

In an appeal against an order refusing further security for costs, the appeal was dismissed, and the costs made costs in the cause to the plaintiff. *Bell v. Landon*, 9 P. R. 100.—Boyd.

The plaintiffs obtained an order for the issue of a foreign commission to examine a witness. The order contained the usual direction that the costs be costs in the cause. The evidence was taken, but was not put in at the trial. Boyd, C., held, that the direction in the order as to costs did not preclude the taxing officer from disallowing the costs to the plaintiffs, on the ground that the evidence had not been used. *Dominion &c. Co. v. Stinson*, 9 P. R. 177.

The venue in an action to restrain the infringement of a patent was changed without terms to Brockville. As the defendant has been slow in applying, the costs of the application below and in appeal were made costs in the cause. *Aitchison v. Mann*, 9 P. R. 253.—Boyd.

(c) Other Cases.

The costs of serving an infant personally who is out of the jurisdiction will not be allowed. *Rew v. Anthony*, 9 P. R. 545.—Boyd.

Expense incurred for surveys and other special work of that nature, made in order to qualify witnesses (surveyors) to give evidence are not taxable between party and party, the English Chancery Order 120 (1845) not being in force here. The taxing officer refused to allow charges for maps prepared to identify the details of the line mentioned in the judgment as that which the judge considered the true line, and also for a certificate of the state of the cause, for a letter advising of judgment, and for instructions on motion for judgment:—Held, that there being no error in principle, but only an exercise of discretion by the taxing officer, the court would not interfere with his ruling. *McGannon v. Clarke*, 9 P. R. 555.—Boyd.

A bill had been filed but not served, and was subsequently dismissed with costs by the plaintiff. It appeared that, though no answer had been drawn, the defendant's solicitor had received instructions to defend, some two months before the dismissal of the bill:—Held, that defendant was entitled to tax instructions, and the costs of the taxation. *Bissett v. Strachan*, 8 P. R. 211.—Taylor, *Master*.

Held, that a prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint: as by R. S. O. c. 74, s. 4, the practice of appealing in such a case is assimilated to that under Dom. Stat. 33 Vict. c. 47, which confines the right of appeal to the defendant. A prohibition was therefore ordered, but without costs, as the objection to the jurisdiction had not been taken in the court below. *In re Murphy and Cornish*, 8 P. R. 420.—Osler.

Plaintiff sued C. and G., G. being a married woman, and obtained a verdict against both. In term both defendants obtained a rule to enter a nonsuit for them, or a verdict for G. The latter part of the rule was made absolute. The taxing officer disallowed the plaintiff any costs in term, because he had not given notice that he abandoned his verdict against G., and taxed to her

one half of the costs of the term motion, both defendants having appeared by the same attorney:—Held, on appeal, that a proper proportion of the costs in term should be allowed to the plaintiff, against defendant C., and the taxing officer was directed to enquire whether any binding contract of retainer had been entered into by G., and if not to allow her only disbursements. *Clark v. Creighton et al*, 9 P. R. 125.—Osler.

On a taxation between party and party, instructions for reply will not be allowed, as well as instructions for statement of claim. But expenses incurred in procuring a deed, and certain other documents, which caused a saving of expense, were allowed. *Torrance v. Torrance*, 9 P. R. 271.—Proudfoot.

See *Agnew v. Plunkett*, 9 P. R. 456, p. 46.

2. Costs of Taxation.

Held, that the Local Masters, who are paid by fees instead of salary, are entitled to charge one dollar per hour in money under Chancery Tariff of 23rd March, 1875, when taxing costs. *McGannon v. Clarke*, 9 P. R. 555.—Boyd.

XI. MISCELLANEOUS CASES.

Costs not asked for in rule, though they were at the bar:—Held, no objection, as they are in the discretion of court under the Judicature Act. *In re Peck and the Corporation of the Town of Galt*, 46 Q. B. 211.

Where an indictment for obstructing a highway had been removed by certiorari, at the instance of the private prosecutor, into this court, and the defendant had been acquitted:—Held, that there was no power to impose payment of costs on such prosecutor. *Regina v. Hart*, 45 Q. B. 1.

The Court, however, has power to make payment of costs a condition of any indulgence granted in such a case, such as the postponement of the trial or a new trial. *Id.*

Right to recover costs from opposite party where attorney is paid a fixed salary. See *Stevenson v. Corporation of Kingston*, 31 C. P. 333, p. 43. See 46 Vict. c. 18, s. 280, sub-s. 3.

The question as to jurisdiction being important, and open to reasonable doubt, no costs were allowed. *Re North York Election*.—*Pater-son v. Mulock*, 32 C. P. 458.

Costs refused on ground of delay. See *Hyde v. Barton*, S P. R. 205.

Where affidavits used on a motion were badly written, scarcely legible and difficult to decipher, the Court refused the plaintiff all costs connected with their preparation, although the costs of the suit were given him. *Burnham v. Garvey*, 27 Chy 80.

Where the petitioner had carefully abstained from ascribing fraud or fraudulent conduct to the plaintiff, and the circumstances were such as to invite discussion, the court in dismissing the petition did so without costs. *Ricker v. Ricker*, 27 Chy. 576.

The wrong (if any) complained of being a personal wrong on the part of the members of the

council who voted for the resolution:—*Quare*, if costs were adjudged to the plaintiff, whether they should not be paid by those members. *Marsh v. Huron College*, 27 Chy. 605.

Where, on a dissolution of partnership between the plaintiff and defendant, it was agreed that the defendant should wind up the concern, and the plaintiff having demanded a statement of account the defendant rendered an untrue and imperfect one, whereupon the plaintiff brought this action for a winding up, claiming that the defendant was indebted to him on account of partnership assets received, which the defendant denied, and the plaintiff succeeded:—Held, that the defendant must pay the costs of the suit. *Carmichael v. Sharp*, 1 O. R., Chy. D. 381.

The testator was seized of certain lands which were subject to incumbrances, and by his will directed the same to be sold if his sons in succession should not redeem. One of the sons, R. to whom the first privilege of redeeming was given, availed himself thereof and redeemed the property, which was subject to certain charges imposed by the will in addition to the incumbrances:—Held, that the right to redeem was in effect a right to purchase, as the mortgages and charges created by the will amounted to about as much as the land was worth, and that R. had acquired a good title free from any claim of his brothers; and his brothers having instituted proceedings against him claiming an interest in the estate, that he was entitled to recover his costs not out of the estate of the testator but from the plaintiff personally. *Stevenson v. Stevenson*, 28 Chy. 232.

A person of the same name as the defendant served by mistake with the writ in the action, was held entitled to his costs of opposing a motion for judgment under Rule 324, O. J. Act. *Lucas v. Fraser*, 9 P. R. 319.—Dalton, Master.

Boyd, C. overruled a demurrer without costs, as it was the first occasion the point decided under it had arisen since the Judicature Act. *Rumohr v. Marx*, 29 Chy. 179.

Two of the four convicting justices were licensed auctioneers for the county, and persisted in sitting after objection taken on account of interest, though the case might have been disposed of by one justice:—Held, that they were disqualified, and in quashing the conviction on that ground the court ordered them to pay the costs. *Regina v. Chapman*, 1 O. R., Q. B. D. 582.

Held, on further directions, that the costs having been incurred in a proceeding consented to under a common mistake of parties as to the proper tribunal to decide the question, each party should bear his own costs. *Dalby v. Bell*, 29 Chy. 336.

An order was made by the Master in Chambers changing the venue from the Assizes at Simcoo, for which notice had been given, to the Chancery sittings at London. The judge presiding at those sittings having refused to take the case, as it belonged to a Common Law Division:—Held, without determining whether the master's order was a proper one, that the plaintiff was justified in acting on it, and his costs occasioned by the abortive attempt at trial, were allowed to him. *Schwob v. McGloughlin*, 9 P. R. 475.—Cameron.

Sureties sued on a bail-bond, obtained an order to stay proceedings on the tender of their pri-

cipal, "upon payment of costs."—Held, that the words "upon payment of costs" are words of agreement, not mere words of condition, and that execution for the costs was properly issued under the order. *Stuart v. Branton et al*, 9 P. R. 566.—Dalton, Master.

M. being seized in fee of land mortgaged to the plaintiff, and then sold to D. expressly subject to the mortgage. D. sold to one Maybe in the same manner, and Maybe sold to defendant, who had notice of the title, covenanting against incumbrances. The plaintiff proceeded against M. and the defendant and obtained judgment for sale on nonpayment and costs, whereupon defendant paid the plaintiff's claims for debt, interest and costs, and took an assignment of the judgment and mortgage:—Held, that the defendant had no right under such judgment to levy from M. any portion of the costs so paid, for if he were allowed to do so, M. by the effect of the conveyances would have a remedy over for them against the land defendant's property, and could then force defendant to pay them back. *Kempt v. Macauley*, 9 P. R. 582.—Dalton, Master.

See *Imperial Bank v. Dickey*, 8 P. R. 246, p 34.

COUNCIL.

See MUNICIPAL CORPORATIONS.

COUNSEL.

See BARRISTER AT LAW.

COUNTER CLAIM.

See PLEADING.

COUNTY ATTORNEY.

Where the account of the county attorney of York for the quarter ending 31st September, 1879, for expenses connected with the administration of criminal justice, was audited by the county board of audit, and paid, but certain of the items were disallowed by the provincial treasurer as not payable by the Crown out of the consolidated revenue fund, not being contained in the schedule, and the board of audit, therefore, in auditing the county attorney's account for a subsequent quarter, deducted therefrom the amount of said disallowed items a mandamus was granted to the board to rescind their order for such deduction. *In re Fenton, County Crown Attorney of the County of York, and the Board of Audit of the County of York*, 31 C. P. 31.

Under an Order in Council the County Attorney is entitled to \$4 on receiving and examining all informations, &c., connected with criminal charges for the Court of Assize, &c., upon the certificate of the Crown counsel that such fee should be allowed. One C. on being brought before the county judge on twenty-five charges of larceny, having elected to be tried by a jury, was tried at the ensuing assizes and convicted

on three of them; but the remaining twenty-two cases were not tried. The plaintiff, a county attorney, obtained the Crown counsel's certificate for and charged a fee of \$4 in each of the above twenty-five cases, which was passed by the board of audit, and paid by the county treasurer, but upon the twenty-two untied cases being disallowed by the Provincial Treasurer and his decision communicated to the board of audit, they deducted the amount from a subsequent account:—Held, that a mandamus would not lie to the board of audit to rescind their order, the ruling of the Provincial Treasurer being a good reason for deducting the amount which was a matter for their discretion under the R. S. O. c. 85. *In re Stanton and the Board of Audit, of the County of Elgin*, 3 O. R., C. P. D. 86.

A fee of fifty cents is allowed to the county attorney for attendance in the County Judge's Criminal Courts, and making the necessary entries for each prisoner not consenting to be tried summarily. The plaintiff charged fifty cents for actual attendances and making the necessary entries in each of the twenty-five charges preferred against C., which were separately read over to him and his election taken thereon. The three cases on which the prisoner was actually tried were only allowed by the board of audit, on the ruling of the Provincial Treasurer:—Held, that for the same reasons, as above a mandamus would not lie to the board of audit to allow the fee in the other cases. *Ib*.

The plaintiff claimed \$1 for an affidavit verifying the jurors' book, and \$1 for a certificate drawn up by him for the county judge to sign, of the receipt of such books, &c. The tariff allows \$1 "for each certificate required to be entered in the jurors' book to verify the same:—Held, that these fees could not be allowed, and that a mandamus would not lie. *Ib*.

See *Van Norman v. Grant*, 27 Chy. 498, p. 35.

COUNTY COURTS.

I. JUDGE.

1. *Appointment of*, 167.
2. *Proceedings Against*, 167.
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V. APPLICATION FOR FULL COSTS.

1. *Generally*—See COSTS.
2. *In Interpleader*—See INTERPLEADER.

I. JUDGE.

1. *Appointment of*.

Held, that the commission in this case appointing a Deputy Judge during pleasure and the absence of the County Judge was validly issued under R. S. O. c. 42, and that it was not essential to enable the Deputy Judge to act that the County Judge should be absent from the county. *Regina v. Fee*, 3 O. R., C. P. D. 107.

2. *Proceedings Against*.

Certain charges having been preferred against a County Court Judge, a commission was issued under the Great Seal of Canada, reciting these facts and the provisions of 22 Geo. III. c. 75, (Imp.) and directing the commissioners to examine into the charges, and for that purpose to summon witnesses, and require them to give evidence on oath and produce papers; and to report thereupon. The enquiry proceeded, and a motion was made for a prohibition:—Held, that enquiries under the Imperial Act should be made before the Governor General in Council, and the authority could not be delegated, nor enquiry upon oath authorized by commission:—Held, also, that the commission could not be supported at common law, for it created a court for hearing and enquiring into offences without determining. *Re Squier*, 46 Q. B. 474.

The C. S. C. c. 13, and 31 Vict. c. 38 (D.) give power to issue commissions for enquiring into the administration of justice when the enquiry is not regulated by any special law, and an enquiry into the conduct of any one connected with the administration of justice is within the meaning thereof. But:—Held, that this enquiry into the conduct of a County Court judge falls within the exception in the Act, being regulated by C. S. U. C. c. 14, ss. 1 and 4, which are a special law for such cases. *Ib.*

The 32 Vict. c. 22, s. 2 (O.); 32 Vict. c. 26 (O.); 33 Vict. c. 12, s. 1 (O.), and R. S. O. c. 42, s. 2, assuming to repeal C. S. U. C. c. 14, and C. S. U. C. c. 15, s. 3, and to abolish the Court of Impeachment for the trial of County Court judges, and regulate their tenure of office are ultra vires of the Provincial Legislature. *Ib.*

The tenure of office of the County Court judges is still regulated by C. S. U. C. c. 25, s. 3. *Ib.*

The different modes of proceeding against County Court judges for misconduct pointed out. *Ib.*

II. JURISDICTION.

1. *Liquidated and Unliquidated claims*.

The plaintiff sued the defendant on a foreign judgment for \$240, and specially endorsed this amount upon the writ of summons. He obtained judgment in default of appearance:—Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O. c. 50, s. 153. *Davidson v. Cameron*, 8 P. R. 61.—Dalton, Q. C.

A County Court has jurisdiction to try a claim up to \$400, which is made up of an unliquidated amount of less than \$200, and the balance of a liquidated amount. *Vogt v. Boyle*, 8 P. R. 249.—Hagarty.

The plaintiff sued in the County Court on the indebitatus count for \$375, claiming by his particulars, balance due from Defendant to 1st Nov., 1877, \$120; wages from 1st Nov., 1877, to 1st Nov., 1878, \$360; less amount paid \$160. Balance, \$320. On objection being taken at the trial to the jurisdiction of the County Court, the plaintiff was allowed to amend by striking out all the items except the first:—Held, affirming the judgment of the County Court, that the particulars were no part of the record, which shewed an amount within the jurisdiction of the County Court; but Held, also, that judgment for that sum would be a bar to any future action for work done at any time before the commencement of this suit. *Davidson v. The Belleville and North Hastings Railway Company*, 5 A. R. 315.

Action for the price of thirty hogsheads of goods. It appeared that K. sold to S., the defendants' testator, a quantity of goods, which K, in his evidence, said was a definite quantity, which he could not recollect, but not less than thirty hogsheads and not more than forty, at the price of \$10 per hogshead:—Held, that the demand was liquidated by the act of the parties at the time of sale, and the action was therefore within the jurisdiction of the County Court. Per Patterson, J. A.—That it was not improper to leave to the jury the question whether the amount was ascertained by the act of the parties. *Watson v. Severn et al.*, 6 A. R. 559.

In an action in a County Court on a promissory note made by the defendant, in which the defendant claimed indemnity against the third party, the third party having appeared, the learned Judge of the County Court directed certain issues to be tried between the defendant and the third party. At the trial he found for the plaintiff, and investigated accounts between the defendant and the third party amounting to more than \$10,000, upon which he found that a balance of more than \$3,000 would be payable to the defendant, and he directed that the third party should, out of this balance, pay to the defendant the amount of the plaintiff's claim. On a motion for a prohibition:—Held, that the order directing the issues between the defendants and the third party, with the proceedings taken under it were right. Held, also, that as the only relief which could be given to the defendant against the third party, was protection against the demand of the plaintiff, which was within the pecuniary jurisdiction of the County Court, the learned judge was not acting beyond his jurisdiction in investigating accounts of sums beyond his jurisdiction. *Neill v. Corkindale et al.*, 4 O. R., Q. B. D. 317.

2. Equitable Jurisdiction.

The County Court on its equity side had power to grant an injunction in any case coming within its jurisdiction. The fact of the title to land coming in question did not oust the jurisdiction of the County Court on its equity side. *Rae v. Trim*, 8 P. R. 405.—Taylor, Master.

See *Doubledee v. Credit Valley R. W. Co.*, 8 P. R. 416, p. 156.

3. Title to Land in Question.

S., being indebted to the plaintiffs, entered into an agreement to mortgage to them, amongst other lands, certain lands known as the Dominion Hotel property. A mortgage was on the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and a lot formerly owned by S. adjacent thereto inserted. The defendant had been the tenant of S., and after the mortgage, attorned and paid some rent to the plaintiffs, believing them to have a title to the lands. In an action for arrears of rent :—Held, affirming the judgment of the County Court of York, that after such attornment and payment of rent, the defendant could not be heard to deny the plaintiff's title, and they being the equitable owners of the land, were entitled to recover :—Held, also, that the title not being open to question by the defendant the County Court had jurisdiction. *Bank of Montreal v. Gilchrist*, 6 A. R. 659.

See *Rae v. Trim*, 8 P. R. 405.

4. Other Cases.

A County Court judge has power to give a fiat in Term time for the issue of a writ of quo warranto to try a contested Municipal Election :—Held, that Rule 1 M. T. 14 Vict. has become inoperative by the effect of subsequent statutory enactments to which it is repugnant. *Regina ex rel., McDonald v. Anderson*, 8 P. R. 241.—Osler.

An issue had been directed from a County Court to one of the Superior Courts under R. S. O. c. 49, s. 12, to try whether a conveyance of certain lands by a judgment debtor was fraudulent, and the County Court had defined the issue to be tried, and the time and place of trial. The plaintiff, in pursuance of the direction, prepared and delivered the issue to defendant, the grantee in the conveyance, who did not return it ; and the plaintiff, after the time for trial had elapsed, applied in the Superior Court for an order absolute for sale of the land :—Held, such order could be made only in the County Court, whence the issue had been directed, and that the Superior Court could only try the issue, and could make no final disposition of the matter :—Held also, that the application was not in any event well founded, as the plaintiff should have proceeded with the trial of the issue. Quere, as to the granting of a new trial, or reviewing the verdict upon such an issue. *Merchants' Bank v. Brooker*, 8 P. R. 135.—Osler.

A verdict was entered for the plaintiff on the trial of an issue directed by the Court of Chancery, to be tried at the sittings of the County Court of the county of Duferin. The County

Court judge set aside the verdict and entered a nonsuit, on grounds embracing matters of law as well as of fact and evidence :—Held, that he had no power to do so, and that the application should have been made to the Court that directed the issue. *Barker v. Leeson*, 9 P. R. 107.—Proudfoot.

Held, that interpleader being a proceeding in the action, a County Court judge under Rule 422 O. J. Act has jurisdiction to entertain it, but in this case the judge having disposed of the matter summarily without the consent of the parties, an issue was directed. *Coulson v. Spiers*, 9 P. R. 491.—Osler.

Power of County Court judge to set aside writ of quo warranto when issued on his fiat. See *Regina ex rel. Grant v. Coleman*, 8 P. R. 497 ; *S. C.* 46 Q. B. 175 ; 7 A. R. 619 ; *Regina ex rel. O'Dwyer v. Lewis* ; *Sub nom Regina ex rel. Dwire v. Lewis*, 8 P. R. 497 ; 32 C. P. 104 ; 7 A. R. 619.

As to jurisdiction of High Court of Justice to interfere with County Court judges order for immediate possession of land taken under R. S. O., c. 165, s. 20, sub-s. 23. See *Jenkins et al. v. The Central Ontario R. W. Co.*, 4 O. R. 593.

III. PRACTICE.

Held, that in case of interpleader by a sheriff between two claimants, one a plaintiff in a Superior Court suit, the other a plaintiff in a County Court suit, the application for an interpleader order was properly made in the Superior Court, although the seizure was made under the County Court writ before the Superior Court writ came into the sheriff's hands. *Strange v. Toronto Telegraph Co.*, 8 P. R. 1.—Dalton, Q. C.

Held, that there is no appeal to the full Court in term from an order of the clerk of the Crown and pleas made on an application to change the venue in County Court cases under R. S. O., c. 50 s. 155 ; but the only appeal in such cases is to a judge in Chambers under sec. 31 of the Act :—Held, however, that if an appeal did lie to the full Court it might be made direct thereto without first going before a judge in Chambers. *Mahon et al. v. Nicholls*, 31 C. P. 22.

Seemle, in such cases, the proper course is to follow, as laid down in the Act, the practice in force in the Superior Courts ; and that the mere fact of the cause of action having arisen in the county to which it is sought to change the venue is not of itself sufficient to outweigh any actual preponderance of convenience arising from other causes in favour of retaining the venue where the plaintiff had laid it. *Id.*

Where a rule nisi in a County Court was ordered by the judge to stand over until the next term :—Held, that it was not necessary to take out a rule to enlarge the rule nisi to prevent it from lapsing. *In re Dean v. Chamberlin*, 8 P. R. 303.—Osler.

In an action in a County Court, tried by a judge without a jury, judgment was given for \$36, no order being made as to costs :—Held, that no costs could be awarded, and a mandamus was granted to the County Court clerk to enter up judgment for the plaintiff with costs, and without allowing defendant to set off against the

judgment the difference between County and Division Court costs. *Re Great Western Advertising Co. v. Rainer*, 9 P. R. 494.—*Armour*.

See *Merchants' Bank v. Brooker*, 8 P. R. 133, p. 169; *Barker v. Leeson*, 9 P. R. 107, p. 170.

IV. APPEAL FROM.

1. When appeal lies.

Although the jurisdiction of the Court of Appeal is not limited to appeals from the County Court as it is in appeals from the Superior Courts, under s. 18, sub-s. 3, of the Appeal Act, it will not in ordinary cases interfere where a new trial has been refused by the County Court upon a matter of discretion only, *Campbell v. Prince*, 5 A. R. 330.

In this case, however, being an action for assault against a public officer, in which the jury had found a verdict of \$100, and a new trial, asked for on the ground that the verdict was against evidence, was refused, the Court of Appeal granted a new trial, as the evidence strongly preponderated in the defendant's favour and there was reason to believe the jury had been misled by the charge. As the judgment was varied in a matter of discretion no costs were given. *Ib.*

The verdict herein was set aside by the County Court, and a nonsuit entered upon a ground not taken as a defence at the trial or in the rule nisi:—Held, reversing the judgment that the learned judge erred in giving effect to the objection, which, if taken at the trial, would have been met with an amendment. As the evidence shewed that the plaintiff was entitled to succeed upon the merits, the appeal was allowed, and the rule in the Court below discharged. *Clarke et al v. Barron*, 6 A. R. 309.

Where the County Court judge granted a new trial owing to his dissatisfaction with the verdict, the court refused to interfere with his discretion, as it did not appear that he was clearly wrong. *Hunter v. Vanstone*, 6 A. R. 337.

In an action of replevin the defendant, for a second plea, avowed for board due by plaintiff to him as a boarding-house keeper; and for a third, avowed for a lien on the goods of plaintiff under R. S. O., c. 147, s. 2. On the trial, before the judge of the County Court (York) without a jury, the evidence as to whether the defendant was the keeper of a boarding-house was contradictory, but the learned judge decided in favour of the plaintiff, holding that the defendant was not a boarding-house keeper. On appeal this finding of the County Court judge was affirmed, although, had the matter come before this court in the first instance, it would have decided otherwise, and under the circumstances, no costs of the appeal were given to the respondent. *Rees v. McKeown*, 7 A. R. 521.

The court, having no power on an appeal from the County Court to amend the record, allowed the appeal on payment of costs by the appellant, so far as to direct the issue of a rule nisi, upon the return of which in the court below, the necessary amendment could be made. *Wilson v. Brown et al.*, 6 A. R. 411.

This case had been remitted to the Court below, this court being of opinion that the record should be there amended and a verdict entered for the plaintiff against the defendant B. alone (6 A. R. 411). The learned judge of the County Court, instead of entering such a verdict, directed a new trial, the parties to apply to amend their pleadings as they might be advised, so that B. might raise any defence which he was not obliged to raise in the action on the joint liability:—Held, that the direction of the learned judge of the County Court as to the way in which he thought it most just to the defendant B. that the application to amend should be made, was an exercise of his discretion with which this Court would not interfere. *S. C.*, 7 A. R. 181.

Appeal in garnishee proceedings. See *Van Norman v. Grant*, 27 Chy. 498, p. 35; *Sato et al. v. Hubbard*, 6 A. R. 546, p. 35.

Appeal from order of county judge setting aside fiat and writ of summons in the nature of a quo warranto. See *Regina ex rel. Grant v. Coleman*, 7 A. R. 619.

See *Mahon et al. v. Nicholls*, 31 C. P. 22, p. 170.

2. Reference back to assess Damages.

The Court of Appeal directed a verdict to be entered for the plaintiff against a tavern keeper for selling liquor to her husband after being forbidden by the plaintiff, his wife, to do so, but referred it back to the County Court judge to assess the damages, declining to follow the course adopted in *Denny v. The Montreal Telegraph Co.*, 3 A. R. 628. *Austin v. Davis*, 7 A. R. 478.

3. Costs.

As the judgment was varied on a matter of discretion, no costs of appeal were given. *Campbell v. Prince*, 5 A. R. 330.

Security for costs under joint stock companies winding up Act (41 Vict. c. 5) Ont. See *Re Union Fire Ins. Co.*, 7 A. R. 783, p. 175.

See *Rees v. McKeown*, 7 A. R. 521, p. 171.

COURT OF APPEAL.

I. APPEAL FROM SUPERIOR COURTS.

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II. APPEAL FROM COUNTY COURTS.—See COUNTY COURTS.

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IV. MISCELLANEOUS CASES RELATING TO APPEAL.—See APPEAL.

I. APPEAL FROM SUPERIOR COURTS.

1. When Appeal lies.

Rules 274 and 317, O. J. Act. restrict the jurisdiction of the Divisional Court after judgment to cases in which the findings of fact have been undisputed, and in which it is only sought to modify or set aside the conclusion drawn by the Judges therefrom; but if the appeal is on the whole case, as to both facts and law, it must be to the Court of Appeal. *Trude v. Phoenix Insurance Company*, 29 Chy. 426.

What is proper compensation to be allowed to a trustee for his management of a trust estate is a matter of opinion, and even if, in granting the allowance, the Court below may have erred on the side of liberality, that alone is not sufficient ground for reversing the judgment. Where the master had allowed \$125, which the court, on appeal, increased to \$250, this court refused to interfere. *McDonald v. Davidson*, 6 A. R. 320.

Where the question involved affected matters arising in the exercise of statutory powers, and was of general interest, leave was given to appeal although a sum less than \$200 was at stake. *O'Donohoe v. Whitty*, 2 O. R., Chy. D. 424. See also S. C. 9 P. R. 361, p. 174.

The plaintiff being in possession of land as tenant of H., was evicted by the defendant, who claimed under an overdue mortgage. A writ of *replevin* was entered at the trial, on the ground that the defendant was at law entitled to possession, evidence of equitable right to possession in the plaintiff having been refused. The Court of Queen's Bench in its discretion granted a new trial. On appeal to the Court of Appeal:—Held, that the court could not interfere. *Robinson v. Hall*, 6 A. R. 534.

As to interfering with discretion of judge on an application for an interlocutory injunction. See *Hathaway v. Doig*, 6 A. R. 264.

The rule generally followed by the court is not to review the finding of the judge of first instance, where his decision depends upon a balance of testimony; still, if the court in banc upon an application to it has reversed that finding, this court must be satisfied upon appeal, that the court in banc was wrong before it will interfere with that judgment. *Hale v. Kennedy*, 8 A. R. 157.

2. Time for Appealing and Notice.

Where a decree was made at the hearing of a case, but certain questions were reserved for further directions:—Held, that the year within which an appeal could be brought ran from the making of the decree on further directions, and not from that on the hearing. *Freed v. Orr et al.*, 6 A. R. 690.

By the oversight of a clerk of the appellant's solicitor, the notice of appeal required by R. S. O. c. 38, (s. 38 O. J. A. 1881), was not given to the Registrar of the court appealed from, but it was duly served on the respondent, who had not been prejudiced. *Boyd, C.*, allowed the notice to be filed within four days, upon payment of costs. *Re Laws.—Laws v. Laws*, 9 P. R. 72.

Held, that s. 38, O. J. Act did not affect the plaintiffs' right under R. S. O. c. 38, s. 46, to

appeal within a year from the making of the decree, which had been pronounced on the 2nd April, 1881, before the first mentioned Act came into force. *Workman v. Robb*, 9 P. R. 169.—Dalton, Q. C.

By the decree in question "Further Directions" were reserved, and it also appeared that the defendant resided in England, but it was not shown that any attempt had been made to communicate with her, nor that if there had it would have been of any use, nor that the defendant had been prejudiced by it:—Held, not sufficient special circumstances to entitle the defendant to obtain leave to appeal after the lapse of the month within which notice of appeal is to be given. *Miller v. Brown, et al.*, 9 P. R. 542.—Proudfoot.

3. Staying Proceedings.

A stay of proceedings will not be granted pending an appeal unless security is given for the costs of appeal as well as those in the court below. Applications for a stay should not be made *ex parte*. *Grand Trunk Ry. Co. v. Ontario and Quebec Ry. Co.*, 9 P. R. 420.—Proudfoot.

Bills of costs amounting to \$250.10 were on a taxation reduced to \$187.10. The plaintiff contended that he was not liable to pay as much as \$187.10, if any sum, and applied to the master in Chambers for an order to stay an execution for \$187.10 pending an appeal to the Court of Appeal, under sec. 33 O. J. Act. This order was refused, and on appeal *Boyd, C.*, held that what was "in controversy on the appeal," was a sum less than \$200, and therefore that the order of the master was right. *O'Donohoe v. Whitty*, 9 P. R. 361.

The plaintiff was permitted to proceed with a new trial pending an appeal, where he shewed that he had already been inconvenienced by delay, that further delay would prejudice him financially, and that by it he might lose important oral evidence. *McDonald v. Murray, et al.*, 9 P. R. 464.—Winchester, Registrar Q. B. D.—Hagarty.

The 27th section of the Court of Appeal Act, R. S. O. c. 38, does not apply to proceedings by injunction, whether the writ has been issued before or after decree in the cause. *McLaren v. Caldwell*, 29 Chy. 438.

See *Powell v. Peck*, 8 P. R. 85, p. 175.

4. Enforcing Judgment.

Held, that a certificate of the Court of Appeal may be acted on in the court below, without issuing a rule upon such certificate. *McArthur v. The Corporation of the Township of Southwold*, 8 P. R. 27.—Jackson, Master.

An *ex parte* motion to make the certificate of judgment of the Court of Appeal an order of the High Court of Justice was refused, the master in Chambers being of opinion such a course was unnecessary. *Freed v. Orr*, 9 P. R. 181.—Dalton, Q. C.

Remarks as to the practice of making a certificate of the judgment of the Court of Appeal an order of the Court of Chancery, which has been the uniform practice of that court and is not in-

consistent with R. S. O. c. 38, s. 44. *Norvall v. The Canada Southern Ry. Co.; Cunningham v. The Canada Southern Ry. Co.*, 9 P. R. 339.—Proudfoot.—The full Court.

The proper way of enforcing a judgment of the Court of Appeal is, to have the judgment of the Court below amended, if necessary, according to the judgment in appeal; and when amended to issue process thereon. Sec. 44 of the Appeal Act, R. S. O. c. 38, is not superseded by s. 14 of the O. J. Act. *Lowson, et al. v. The Canada Farmers' Mutual Ins. Co.*, 8 A. R. 613. See *S. C.*, 9 P. R. 185.

5. Bond and Allowance.

The bond for \$400 given, under the provisions of R. S. O., c. 38 s. 26, is a security for the costs of appeal only; in order to stay execution for the costs of the Court below, further security must be given. *Powell v. Peck*, 8 P. R. 85.—Stephens, *Referee*.

An order allowing \$400 to be paid into Court by the appellant in lieu of a bond will be granted ex parte. *Connolly v. O'Reilly*, 8 P. R. 159.—Stephens, *Referee*.

Where on a motion in Chambers to disallow a bond given on an appeal, it appeared from the examination of one of the bondsmen that he had lands of sufficient value, but that the conveyances to him were unregistered, it was directed that the conveyances should be registered. *Adamson v. Adamson*, 9 P. R. 96.—Stephens, *Referee*.

On appeal to the Court of Appeal from 'the judgment of the Court of Queen's Bench in favour of one P. against the Citizens' Insurance Company, the company paid into Court a sum of money as security for the amount of the judgment, as well as for interest and costs, and also for the costs of the appeal. The appeal was dismissed with costs, and the company then appealed to the Supreme Court and paid a further sum into Court as security for the costs of such appeal. The Supreme Court dismissed the appeal with costs. A judge's order was then obtained, under which the moneys were paid out of court to G. and M., to whom P. had assigned them. The company afterwards appealed to the Privy Council, when the appeal was allowed and the judgment of the Supreme Court reversed. On an action brought therefor:—Held, by Hagarty, C. J., that the company were entitled to recover back the moneys so paid out of Court on the judge's order for principal and interest, with interest thereon from that payment at six per cent.; and also all sums paid for costs, but without interest. *The Citizens Ins. Co. v. Parsons et al.*, 32 C. P. 492.

An appeal under the Act respecting the winding up of joint stock companies, 41 Vict. c. 5 s. 27 Ont., cannot be entertained when security has not been given within eight days from the rendering of the final order or judgment appealed from. *Re Union Fire Ins. Co.*, 7 A. R. 783.

Where a bond good in form with proper sureties was filed with the clerk of the County Court on the last of the eight days, though not allowed by the judge:—Held to be within the words "given security before a judge," and

a sufficient compliance with the Act, though a person thus filing a bond without allowance, risks being deprived of his right of appeal in the event of the bond proving defective. *Id.*

6. Right to take grounds of Appeal not Taken below.

The appeal being allowed in this case on a ground not taken in the Court below or assigned as a reason of appeal, the Court refused the appellant his costs in appeal. *Page et al. v. Austin*, 7 A. R. 1.

When an appeal was allowed on a ground raised for the first time on the argument no costs were given. *Ellis v. The Midland R. W. Co.*, 7 A. R. 464.

On the appeal the defendants urged amongst other grounds, one not taken in the rule nisi or raised by the pleadings, namely, that the evidence disclosed good cause for dismissal. When offered the opportunity at the trial to amend and raise such defence, counsel for the defendants declined to do so:—Held, that the defence could not be raised on appeal. *Lash v. The Meriden Britannia Co.*, 8 A. R. 680.

The petitioner was not allowed to urge before the Court of Appeal a charge of corrupt practices against the respondent personally, which had not been specified in the particulars, or adjudicated upon at the trial of the petition. *South Ontario Election—Farwell v. Brown*, 1 H. E. C. 420; *Sub nom. Farewell v. Brown*, 12 L. J., N. S. 216.

L. was expelled from membership in L' U. St. J., an incorporated benefit society, for being in default to pay six months' contributions. Art. 20 of the society's by-laws, sec. 5, provides that "When a member shall have neglected during six months to pay his contributions, or the entire amount of his entrance fee, the society may erase his name from the list of members, and he shall then no longer form part of the society; for that purpose, at every general and regular meeting, it is the duty of the Collector-Treasurers to make known the names of those who are indebted in six months' contributions, or in a balance of their entrance fee, and then any one may move that such members be struck off from the list of members of the society." L. therefore brought suit under the shape of a petition, praying that a writ of mandamus should issue, enjoining the company to reinstate him in his rights and privileges as a member of the society. 1. On the ground that he had not been put en demeure in any way; and that no statement or notice had been given him of the amount of his indebtedness. 2. On the ground that many other members of the society were in arrear for similar periods, and that it was not competent for the society to make any distinction amongst those in arrears. 3. On the ground that no motion was made at any regular meeting. The Court of Queen's Bench for L. C. (appeal side) held that L. should have had "prior notice" of the proceedings to be taken with the view to his expulsion:—Held, on appeal, that as L. did not raise by his pleadings the want of "prior notice," or make it a part of his case in the court below, he could not do so in appeal. Per Taschereau and Gwynne, JJ.:—A member of that society who admits that he is in

arrears of six months' contributions, is not entitled to "prior notice" before he can be expelled for non-payment of dues. *L'Union St. Joseph de Montreal v. Lapierre*, 4 S. C. R. 164.

7. Costs.

The appeal in this case was allowed without costs as the bill had been filed on the authority of *Boale v. Dickson*, 13 C. P. 337, which was properly followed by the court below but was overruled by this Court. *McLaren v. Caldwell, et al.*, 6 A. R. 456.

On appeal to the Court of Appeal the judgments of the Court of Chancery in favour of the plaintiffs respectively, were affirmed with costs of appeal; and the defendants appealed to the Supreme Court. In the first case that court gave leave to the defendants (appellants) to amend their answer, saying nothing as to costs, and upon such amendment being made, declared that the award upon which the bill had been filed should be null and void, but said nothing about costs. In the second case the Supreme Court ordered a new trial to be had between the parties, without costs to either party. The plaintiffs having obtained orders of the Court of Chancery making the certificates of the Court of Appeal of the judgments in appeal orders of the Court of Chancery, issued executions thereon for the costs awarded in appeal:—Held, that the plaintiffs were not entitled to the costs of the appeal to the Court of Appeal, and the executions were set aside. *Norvall v. Canada Southern R. W. Co.*; *Cunningham v. Canada Southern R. W. Co.*, 9 P. R. 339.—Proudfoot and the Full Court.

An appeal from the Court of Common Pleas which ordered a nonsuit after verdict for the plaintiff (31 C. P. 394) the court being equally divided was dismissed with costs. *Neill v. The Travellers Ins. Co.*, 7 A. R. 570.

Where the judgment was varied on a matter of discretion no costs of appeal were given. *Campbell v. Prince*. 5 A. R. 330.

See *Page et al. v. Austin*, 7 A. R. 1, p. 176; *Ellis v. The Midland R. W. Co.*, 7 A. R. 464, p. 176.

8. Other Cases.

As the court below had pronounced no opinion as to whether there should be a new trial or not, the appeal was simply allowed, setting aside the nonsuit but leaving the question of new trial untouched. *Walton et al. v. Corporation of the County of York*, 6 A. R. 181.

In an action for negligence in not keeping a county road in repair, the jury found for the plaintiff. A rule nisi having been subsequently obtained to enter a nonsuit, or for a new trial, this court made it absolute to enter a nonsuit. On appeal the court allowed the appeal, but made no order as to that portion of the rule nisi in which a new trial was asked, leaving it to be disposed of by this court:—Held, that the rule nisi was completely and finally disposed of, so far as this court was concerned, by the rule to enter a nonsuit, which the defendants, by taking it without asking for any reservation so far as regarded the new trial, had acquiesced in:—Held, also, *Wilson, C. J.*, dissenting, that the Court of Appeal have no power, under sec. 23 of the Court

of Appeal Act, R. S. O. c. 38, to direct this court to reopen the rule or reconsider the question whether, in their discretion, a new trial should be granted. *Walton v. The Corporation of the County of York*, 32 C. P. 35.

Two only of several defendants appealed. The respondent by her reasons against the appeal claimed relief over against two of the other defendants to the suit, and served them with the reasons against appeal, and subsequently with the printed appeal book, and with notice of setting down the appeal for argument. These defendants had never been served with the statutory month's notice of appeal, nor furnished with security for the costs of appeal, nor afforded an opportunity of taking part in the settlement of the appeal book:—Held, that they were properly before the Court. *Freed v. Orr et al.*, 6 A. R. 690.

A cause had been carried down to trial in 1879, when it was postponed at the instance of defendants, and a trial took place in 1880, when a verdict was rendered in favour of the plaintiffs, which the Court of Queen's Bench refused to set aside. The defendants, thereupon appealed to this court, and when the appeal came on to be heard (in 1882) an application was made by the defendants to be allowed to adduce evidence alleged to have been recently discovered, tending to relieve the defendants from liability, which evidence it appeared, consisted mainly of entries in the books of the defendants. The court being of opinion that proper diligence had not been used by the defendants, as in such case they must have discovered the evidence at a much earlier date, refused the application with costs. *Murray et al. v. The Canada Central Railway Co.*, 7 A. R. 646.

The prisoner was remanded for extradition by the Chancery Division of the High Court of Justice, which on appeal to this Court was affirmed, the court being equally divided, (8 A. R. 31.) A second writ of habeas corpus was thereupon obtained, and the prisoner brought before the Common Pleas Division, when he was again remanded, whereupon he again appealed to this court, which appeal was dismissed with costs, as under such circumstances a second appeal could not be entertained. Per *Hagarty, C. J.*, (Spragge, C. J. O. concurring). The prisoner having already appealed to this court from the judgment of the Chancery Division, he must abide by the legal result of such appeal, viz., the dismissal of it and consequent affirmation of the decision appealed from, and he could not again ask the interference of this court on the same state of facts. *In Re Hall*, 8 A. R. 135, see *S. C.* 32 C. P. 498.

Per *Burton and Patterson, JJ.A.* The grounds for the technical rule of practice of the House of Lords on an equal division have no existence in other appellate tribunals, although in the particular case, the appellate court is the court of last resort. *Id.*

The effect of an equal division in this court, as in a court of first instance, is simply that the rule or motion drops or the appeal is dismissed, and the judgment below remains undisturbed, but is not considered as a binding authority. *Id.*

The Act 29-30 Vic. c. 45, apparently substituted the right of appeal in habeas corpus cases for successive applications from court to court. *Id.*

Per Patterson, J. A. By the effect of the Judicature Act, a decision of any one division is a decision of the High Court, this matter had therefore been already disposed of on the former appeal. *Id.*

Section 43 of the Court of Appeal Act, which provides "when on an appeal against a judgment in any action personal, the Court of Appeal gives judgment for the respondent, interest shall be allowed by the court for such time as execution has been delayed by the appeal," does not apply to a case where the judgment of the court below is in favour of the defendant, and is reversed on appeal. In such case the court on reversing the judgment, gave liberty to the appellant, the plaintiff in the court below, to move to be at liberty to enter judgment as directed by this court, nunc pro tunc, whereby he would be enabled to recover interest on the amount of the verdict rendered in his favour. *Quintan v. The Union Fire Ins. Co.*, 8 A. R. 376. (See 47 Vict. c. 10 s. 4.)

When upon the argument of an appeal, the respondent omitted to point out in what respect the replications of the plaintiff were demurrable, the court refused to wade through the mass of pleading which had been filed in the court below, to find it out for themselves; and being of opinion, in the absence of argument, that the pleading was good, affirmed the judgment of the court below upon such pleadings. *Id.*

The unnecessary and improper length of pleadings remarked upon. *Id.*

When the judgment in the court below overruled a demurrer on the assumption that a plea had been amended according to leave given, but the appeal book did not shew the amendment to have been made, and the defence as set out in the printed case was held bad on demurrer, the appeal by the plaintiff was allowed with costs. (Cameron, J., dissenting, who thought that under the circumstances the plea should be treated as amended pursuant to the leave granted by the court below, and that the judgment of the court below which was in the opinion of this court right as it was given, should not be reversed.) *Bossell v. Sutherland*, 8 A. R. 233; 32 C. P. 131.

Plaintiffs, who resided in England, obtained a verdict for the price of goods in defendants possession. The defendants appealed to the Court of Appeal. Plaintiffs applied for payment out of \$300 paid in by them as security for costs on commencing the action:—Held, that as the plaintiffs were shewn to have goods in the country, and in the defendants possession, the \$300 should be paid out. But for this the plaintiffs would not have been entitled to the money, the appeal being a step in the original cause, not a new action. *Napier et al v. Hughes et al*, 9 P. R. 164.—Wilson.

It appeared that the Despatch Company, defendants herein had given notice of appeal to the Court of Appeal from the decision of Osler, J., before the other defendants appealed to this court. Per Armour, J. Where there is a general judgment against several defendants, Rule 510 does not permit them to sever and appeal to different courts, but they were all bound to appeal to the tribunal to which the defendant taking the first step had appealed, and on this ground, the appeal should be dismissed. *Hately et al v. Merchants Despatch Co.*, 4 O. R., Q. B. D. 723.

See *Austin v. Davis*, 7 A. R. 478, p. 172.

COURT OF CHANCERY.

I. JURISDICTION, 180.

II. APPEAL FROM—See COURT OF APPEAL.

III. PRACTICE IN—See PRACTICE.

I. JURISDICTION.

The Court of Chancery has jurisdiction in cases of escheat, and held that it was proper for the Attorney General to file a bill in that court to enforce an escheat. *Attorney General of Ontario v. O'Reilly*, 6 A. R. 576.

The Court of Chancery has no jurisdiction to restrain proceedings on an order granted by a County Court judge to garnish moneys payable by the county to the plaintiff as Clerk of the Peace and County Crown Attorney. The application should be to the Court of Appeal. *Van Norman v. Grant*, 27 Chy. 498.

Where a member of a college council complains that he has been improperly expelled from the council, the Court of Chancery under the A. J. Act, has jurisdiction in a proper case to decree relief; that Act giving jurisdiction to the Court of Chancery "in all matters which would be cognizable in a court of law," although the remedy in such a case in a court of law would be sought by mandamus. *Marsh v. Huron College*, 27 Chy. 605.

As to power of the Court of Chancery to make an assessment on policy holders in the solvent branches of a Mutual Insurance Company for the purpose of paying off the liability due to the guarantee stockholders. See *Duff v. Canadian Mutual Ins. Co.*, 6 A. R. 238.

Where an agreement for a submission contained a clause that it should be made a rule of the Court of Queen's Bench, in England, and all proceedings thereunder should be governed, as in Great Britain, by the provisions of the English C. L. P. Act:—Held, that this formed no objection to the jurisdiction of the Court of Chancery in this province. *The Direct United States Cable Co. (Limited) v. The Dominion Telegraph Co. of Canada*, 8 A. R. 416.

See also *The Attorney General of Canada, ex rel. Barrett v. The International Bridge Company*, 28 Chy. 65.

COURT OF IMPEACHMENT.

Impeachment of County Court Judge. See *Re Squier*, 46 Q. B. 474, p. 167.

COURT OF REVISION.

See ASSESSMENT AND TAXES.

COURTS.

I. RULES OF—See RULES OF COURT.

II. APPEAL FROM—See APPEAL.

III. PROHIBITION—See PROHIBITION.

IV. COUNTY JUDGES CRIMINAL COURT—See CRIMINAL LAW.

V. JUDGE IN CHAMBERS—See PRACTICE.

VI. NISI PRIUS—See TRIAL.

VII. COURT OF REVISION—See ASSESSMENT AND TAXES.

VIII. SESSIONS—See JUSTICES OF THE PEACE—SESSIONS.

IX. OTHER COURTS—See THEIR SEVERAL TITLES.

Remarks as to what constitutes a Superior or Inferior Court. See *Regina v. O'Rourke*, 32 C. P. 388.

COVENANT.

I. PARTICULAR COVENANTS.

1. *In Leases*—See LANDLORD AND TENANT.
2. *In Mortgages*—See MORTGAGE.
3. *In Policies*—See INSURANCE.
4. *For Title*—See COVENANTS FOR TITLE.

II. INJUNCTION AGAINST BREACHES OF—See INJUNCTION.

A covenant to insure for the benefit of an incumbrancer, operates as an equitable assignment of the policy of insurance when effected. *Greet v. The Citizens Ins. Co.*, 27 Chy. 121.

E. carrying on the trade or calling of a dealer in pictures and photographic business, sold out such business to W., and by the agreement covenanted "not to open or start a retail and photographic business of a similar character" in the city of Toronto for five years. By a subsequent agreement the first was modified, so as to allow E. to sell in any manner to persons residing out of Toronto, and to sell retail in Toronto, on allowing W. a percentage on the prices realized. W. filed a bill alleging that E. had, prior to such second agreement, sold goods in contravention of the first agreement, and had subsequently sold to a large amount, and prayed an account and payment of his percentage. The court [Spragge, C.] being of opinion that such second agreement had been executed for a valuable consideration, granted the decree as asked, and directed the account to be taken by the Master, although the answer professed to state the actual amount of sales, and on the motion for decree had been read as evidence by the plaintiff. *Williamson v. Ewing*, 27 Chy. 596.

Action for purpose of enforcing covenant to maintain a railway station on lands granted to a railway company for the purposes of a station. See *Jessup v. Grand Trunk R. W. Co.*, 7 A. R. 128.

In an action brought to reform a lease and claiming damages for breach of a covenant:—Held, that such claim for damages was not a "purely money demand" under the A. J. Act, R. S. O. c. 49, s. 4. *Gowanlock v. Mans*, 9 P. R. 270.—Dalton, Master.

See also, *Green et al. v. Watson*, 2 O. R. 627.

COVENANTS FOR TITLE.

I. COVENANTS RUNNING WITH THE LAND, 182.

II. OTHER COVENANTS, 182.

I. COVENANTS RUNNING WITH THE LAND.

Where D., the owner of certain lands on selling part to B., inserted this clause in the conveyance: "Bellevue Square is private property, but is always to remain unbuilt upon except one residence with the necessary outbuildings, including porter's lodge," and the purchaser on his part, covenanted not to allow any business of a certain kind to be carried on on the part conveyed:—Held, that the benefit of the restriction passed to the assignee of the purchaser, as one of the advantages and privileges appurtenant to the land, though the word "assigns" was not there, and though the benefit of it was not formally transferred to him. *VanKoughnet v. Denison*, 1 O. R., Chy. D. 349.

Where it is clearly intended to give some tangible benefit to a grantee by such a covenant in the conveyance to him, and it formed a part of the consideration which induced his purchase, the court will go far to give effect to the language, whatever hardship may be occasioned to the party who has entered into the engagement. *Id.*

Where the person who was building the house objected to, held under an agreement for a lease, but had made no outlay on the property till after notice was served on her, nor paid any rent:—Held, that she was not in the same position as an innocent person holding for value under a completed instrument, and the erection of the house must be stopped. *Id.*

Where the square had been built upon for years without objection by purchaser or his vendee, the plaintiff; but the building had been done by purchasers under a mortgage executed by D. before he conveyed to B.:—Held, no proof of acquiescence, as they could not have objected with effect. *Id.*

See also *Clark v. Bogart*, 27 Chy. 450.

II. OTHER COVENANTS.

Action by the plaintiff against defendant as administratrix of one J. McK. for breach of covenant for title contained in a deed made by him to his son, the plaintiff. The deed purported to be under the Short Forms Act, and the covenant was that the grantor had the right to convey, omitting the words "notwithstanding any act of the said covenantor":—Held, following *Brown v. O'Dwyer*, 35 Q. B. 354, that although not in accordance with the statute, it bound the covenantor as an absolute covenant that he was seized and had a right to convey in fee simple. *McKay v. McKay*, 31 C. P. 1.

The deed contained two several parcels of land, and the plaintiff was evicted from one, but was still owner of the most valuable parcel:—Held, that the measure of damages was not the whole purchase money, but only the proportionate value of that part to which the title failed. *Id.*

It appeared that, at the time of the transaction in question, the father was some seventy years old, and reposed great confidence in his son, the plaintiff, and was in the habit of relying upon his advice. Without any apparent reason for parting with the land, on which he lived, and which was worth \$6,000, he was induced by the plaintiff to sell it to him for \$3,000, \$1,000 of which consisted of alleged stale demands by the son against the father, barred by the Statute of Limitations, and the balance of \$2,000 was secured by a mortgage, with interest at six per cent., neither principal or interest being payable for ten years, the father being permitted to remain on the land during his life. The mortgage was produced, with the registrar's certificate of discharge endorsed thereon, but there was no evidence as to the execution of the discharge, or as to how the mortgage came into the plaintiff's possession. There was no corroboration of the plaintiff's statement of the existence of the debt of \$1,000, except a receipt of \$15, which the court refused to accept as genuine, while in corroboration of his assertion of the payment of the mortgage, some four receipts were put in by the plaintiff, which, though purporting to have been given at different intervals and different places, within four years from the execution of the mortgage, all appeared by the water mark to have been written on and torn from the same sheet of paper; and being of a very suspicious character, the court also refused to accept them as genuine:—Held, that the evidence having failed to prove that the mortgage had been paid off, and it being therefore outstanding, no action could be brought on the covenant in the deed. *Ib.*

On a sale of "timber limits" held under licenses in pursuance of the Con. Stat. Canada, c. 23, a clause of simple warranty (*garantie de tous troubles généralement quelconques*) does not operate to protect the purchaser against eviction by a person claiming to be entitled under a prior license to a portion of the limits sold. *Ducondu v. Dupuy*, 9 App. Cas. 150; reversing judgment of Supreme Court, 6 S. C. R. 425.

See also *The Real Estate Investment Co. v. The Metropolitan Building Society*, 3 O. R. 476.

CREDITORS SUIT.

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CRIMINAL LAW.

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3. Sunday.—See SUNDAY.

I. ASSAULT.

1. Evidence.

On an indictment for assault and battery, occasioning actual bodily harm:—Held, that the defendant is not a competent witness on his own behalf under 43 Vict. c. 37, D. *Regina v. Richardson*, 46 Q. B. 375.

Upon the trial of the prisoner, a school teacher, for an indecent assault upon one of his scholars, it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months. After the prosecutrix had given evidence of the assault, evidence was tendered of the conduct of the prisoner towards her subsequent to the assault:—Held, that the evidence was admissible as tending to shew the indecent quality of the assault, and as being in effect a part or continuation of the same transaction as that with which the prisoner was charged. Per Hagarty, C. J., and Armour, J. The evidence was properly admissible as evidence in chief. *Regina v. Chute*, 46 Q. B. 555.

II. BRIBERY.

The giver of a bribe as well as the receiver may be indicted for bribery. *North Victoria Election—Cameron v. Maclellan*, 1 H. E. C. 584.

III. EMBEZZLEMENT.

See *In re Hall*, 8 A. R. 31, p. 185.

IV. FORGERY.

The prisoner was a clerk in the office of the comptroller of the city of Newark, New Jersey,

U. S. A., his duty being to make proper entries of moneys received for taxes in the official books of the comptroller provided for that purpose. Having received a sum of money for taxes, he entered the correct amount at first, and then erasing the true figures he inserted a less sum, with intent to benefit himself by the abstraction of the difference between the two, and to deceive the comptroller and the municipality:—Held, that the offence was forgery, and that the prisoner had been properly committed for extradition. *In re Hall*, 3 O. R., Chy. D. 331; 9 P. R. 373. See next case.

It is not necessary to constitute the crime of forgery that another's right shall have been actually prejudiced, the possibility of prejudice to another is sufficient; and if publication be necessary, the books in question being of a public character, the forged entry in them must be regarded as having been published as soon as made. *Ib.*

The prisoner was a clerk in the employ of the mayor and common council of the city of Newark, (in the State of New Jersey, U. S. A.), a portion of his duties being to receive payment of taxes payable to the city; and on the 18th of November, 1881, a sum of \$562.32, for taxes, &c., due upon certain lands in that city, was paid to him—such sum being included with other taxes in a cheque of the party assessed for \$4,094. The \$562.32 was composed of three items: costs \$7.70, interest \$72.08, and taxes \$482.54—each of which required to be entered in a separate column of the cash-book belonging to the office of the comptroller. The gross sum, (\$562.32), had apparently been entered first in the column headed "Totals," and subsequently in making the separate entries the sum of \$482.54 was entered as \$282.54, and the figure "3" in the total column substituted; the difference (\$200), being abstracted by the prisoner from moneys paid to him on that day:—Held, (Per Spragge, C. J. O., and Galt, J.), that this act amounted to the crime of forgery, and, as such, rendered the prisoner liable to extradition. Per Burton and Patterson, J. J. A., that such alteration was not forgery, though the act amounted to one of embezzlement, and therefore that the prisoner was entitled to be discharged, embezzlement not being one of the offences for which a party was at the time liable to be extradited under the Ashburton Treaty. *In re Hall*, 8 A. R. 31.

The prisoner, who was collector of the County of Middlesex, in the State of New Jersey, kept a book in which to enter the payment and receipts of all moneys received by him as such collector, and which was the principal book of account kept by him. The book was purchased with the money of the county, and was kept in the collector's office, and was left by him at the close of his term of office; it was by statute open to the inspection of those interested in it, and contained the certificate of the county auditors as to the correctness of the matters therein contained:—Held, that the book was the public property of the county, and not the private property of the prisoner. After the book had been examined by the proper auditors as to the amounts received and paid out by and through the prisoner as such collector, and a certificate of the same made by them, the prisoner, who was a defaulter, with intent to cover up his defalcation, altered the book by making certain

false entries therein of moneys received and paid out, and changing the additions to correspond. Some of these entries were by the prisoner himself, and others by his clerk under his direction, but the clerk on finding that such entries were false changed them back:—Held, that this constituted forgery at common law, as well as under our statute 32-33 Vict. c. 19, D.:—Held, also, that under the Extradition Act of 1877, 40 Vict. c. 25, D., it is essential that the offence charged should be such as if committed here would be an offence against the laws of this country. The offence, however, was also proved to be forgery by the laws of New Jersey. *In re Jarrard*, 4 O. R., C. P. D. 265. Affirmed, see 20 C. L. J. 145.

P. was the superintendent of the Blocksley Almshouse, situated in and supported by the city of Philadelphia, U. S. Parties supplying provisions, &c., for the use of the charity were paid by warrants duly prepared and signed by the proper officers thereof. Three such warrants for the payment of certain persons or firms were in the hands of W., the secretary of the almshouse, to be delivered to them on their respectively signing the stub or counterfoil of the warrants. P., who was well known to the secretary, applied to him for these warrants, stating that he had authority from the several parties to sign for them, which he did accordingly, and W. handed over to him the warrants, which were subsequently cashed at the office of the city treasurer. P. having fled to this Province, an application was made for his extradition before the judge of the County Court of Westworth, when expert evidence was adduced proving that according to the Statute Law of Pennsylvania, as also at Common Law as there interpreted, these facts constituted the crime of forgery:—Held, on appeal, per Spragge, C. J. O., and Patterson, J. A. [affirming the judgment of the Queen's Bench Div. 1 O. R. 586], that the acts amounted to the crime of forgery, and so rendered P. liable to be extradited. Per Burton, J. A., and Ferguson, J., that in the absence of any suspicion of any complicity of W. in the fraud, the facts would not have made out the crime of forgery; but as the evidence afforded ground to infer that W. and P. were in collusion, and had combined together for the purpose of committing the fraud by means of the false documents, and was therefore sufficient to warrant the committal of P. for the crime of forgery at common law, the order for his committal for extradition should be affirmed. *In Re Phipps*, 8 A. R. 77.

See also *Regina v. Hovey*, 8 P. R. 345.

V. MALICIOUS INJURY TO PROPERTY.

See *Regina v. Gough*, 3 O. R., 402, p. 187.

VI. MALICIOUSLY WOUNDING.

On motion to discharge prisoner on habeas corpus on conviction before a Police Magistrate, the conviction charged that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly, with intent then and there to do her grievous bodily harm:—Held, that, the addition of the words, "with intent to do grievous bodily harm," did not vitiate the conviction, and

that the prisoner might be lawfully convicted of the statutory misdemeanour of malicious wounding:—Held, also that imprisonment at hard labour for a year was properly awarded under 38 Vict. c. 47. *Regina v. Boucher*, 8 P. R. 20.—Hagarty. Affirmed, 4 A. R. 191.

VII. MURDER AND MANSLAUGHTER.

An indictment contained two counts, one charging the prisoner with murdering M. J. T. on the 10th November, 1881; the other with manslaughter of the said M. J. T. on the same day. The grand jury found "a true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only:—Held,—Affirming the judgment of the court a quo, that the indictment was sufficient. *Theat v. The Queen*, 7 S. C. R. 397.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death, (17th October preceding) the prisoner had knocked his wife down with a bottle: she fell against a door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side. On the reserved questions, viz., whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th November or the 17th October, 1881, was properly received, and whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment:—Held, affirming the judgment of the Supreme Court of New Brunswick, that the evidence was properly received, and that there was evidence to submit to the jury that the disease, which caused her death, was produced by the injuries inflicted by the prisoner. *Ib.*

See *Regina v. O'Rourke*, 32 C. P. 388, pp. 189, 190.

VIII. OBTAINING MONEY UNDER FALSE PRETENCES.

See *Abraham v. The Queen*, 6 S. C. R. 10, p. 188; *Regina v. Goodman et al.*, 2 O. R. 468, p. 189; *Goodman et al. v. Regina*, 3 O. R. 18, p. 189.

IX. RECEIVING STOLEN GOODS.

See *Regina v. St. Denis*, 8 P. R. 16, p. 188.

XI. PROCEDURE.

1. Indictment.

In an indictment purporting to be under 32 & 33 Vict. c. 22, s. 45, D., for malicious injury to property, the word "feloniously" was omitted:—Held, bad, and ordered to be quashed. *Regina v. Gough*, 3 O. R., C. P. D. 402.

On an indictment, containing four counts for obtaining money by false pretences, was endorsed: "I direct that this indictment be laid before the grand jury. Montreal, 6th October, 1880:—By J. A. Mousseau, Q. C.; C. P. Davidson, Q. C.; L. O. Loranger, Attorney-General. Messrs. Mousseau and Davidson were the two counsel authorized to represent the crown in all the criminal proceedings during the term. A motion supported by affidavit was made to quash the indictment on the ground, inter alia, that the preliminary formalities required by s. 28 of 32-33 Vict. c. 29 had not been observed. The chief justice allowed the case to proceed, intimating that he would reserve the point raised, should the defendant be found guilty. The defendant was convicted, and it was held, on appeal, reversing the judgment of the Court of Queen's Bench, that under 32 and 33 Vict. c. 28, s. 28, the attorney-general could not delegate to the judgment and discretion of another the power which the legislature had authorized him personally to exercise to direct that a bill of indictment for obtaining money by false pretences be laid before the grand jury; and it being admitted that the attorney-general gave no directions with reference to this indictment, the motion to quash should have been granted, and the verdict ought to be set aside. *Abrahams v. The Queen*, 6 S. C. R. 10.

See *Regina v. St. Denis*, 8 P. R. 16, *infra*; *Theat v. The Queen*, 7 S. C. R. 397, p. 187.

2. Case Reserved.

Under C. S. U. C. c. 112, any question of law which may have arisen on the criminal trial, may be reserved for the consideration of the Justices of either of Her Majesty's Superior Courts of common law. Quare, per Armour, J., having regard to the provisions, of the Judicature Act, whether a reservation to the Justices of the Queen's Bench Division of the High Court of Justice was authorized. *Regina v. Bissell*, 1 O. R., Q. B. D. 514.

See *Regina v. O'Rourke*, 32 C. P. 388; 1 O. R. 464, pp. 189, 190.

XII. COUNTY JUDGES CRIMINAL COURT.

The prisoner was convicted before a County Judge's Criminal Court on a charge of receiving stolen goods, knowing them to have been feloniously stolen, and was sentenced to imprisonment. On an application for a habeas corpus—Held, that the court was a Court of Record, and that under R. S. O. c. 70 s. 1, there was therefore no right to the writ. *Regina v. St. Denis*, 8 P. R. 16.—Cameron.

Held, also, that the judge had power to imprison. *Ib.*

Held, also, that if an indictment for stealing certain articles, be sustainable as to some of the articles stolen, the conviction is good, although the indictment may contain any number of articles as to which an indictment could not be sustained. *Ib.*

The prisoners were committed for trial on a charge of gambling in a railway train. On the case coming before the county judge for trial, an indictment was preferred, under 42 Vict. c. 44,

s. 3, D., for obtaining money by false pretences. The prisoners' counsel objected to the prisoners being tried on a different charge from that on which they had been committed. The objection was overruled, and the charge read over to the prisoners, and, on its being explained that they could be tried forthwith or remain in custody until the next sittings of Oyer and Terminer, etc., they pleaded not guilty, and said they were ready for trial. The case then proceeded, and the prisoners were convicted; no question being raised as to their having been tried without their consent, although their counsel took other objections to the proceedings. A writ of habeas corpus having been issued, and the prisoners' discharge moved for, on the ground of the absence of such consent:—Held, that the motion must be refused. Per Wilson, C. J. It was unnecessary to decide whether the prisoners' remedy was by habeas corpus or writ of error, because, on the facts, they were not entitled to either remedy. Per Osler, J. The prisoners having been imprisoned under the conviction of a court of record, an objection of error in a proceeding must be by writ of error: the writ of habeas corpus was therefore improvidently issued, and should be quashed. *Regina v. Goodman and Wilson*, 2 O. R., C. P. D. 468. See next case.

The plaintiffs in error were charged with having defrauded one C. by a game called three card monte. They consented to be summarily tried. When brought up for trial the crown Attorney asked for and obtained leave to substitute a charge of combining to obtain money by false pretences, the prisoners objecting. The trial proceeded without the consent of the prisoners obtained to be tried summarily for this offence. They were convicted and sentenced to one year's imprisonment:—Held, on error, that their consent to be summarily tried on the substituted charge should appear, and that in its absence the conviction was bad:—Held, also that it was bad in adjudging the sentence of one year, the Act, 40 Vict. c. 32 D., only authorizing a sentence for any term less than a year. *Goodman et al v. Regina*, 3 O. R., Q. B. D. 18.

XIII. JURY.

To an indictment for murder the prisoner pleaded, challenging the array of the jury panel, which plea was demurred to and judgment given in favour of the crown by the learned judge, holding the Court of Oyer and Terminer, who, at the request of the prisoner, reserved a case for the consideration of the Common Pleas Division:—Held, not a matter which could be reserved under C. S. U. C. c. 112, and the case was therefore directed to be quashed. *Regina v. O'Rourke*, 32 C. P. 388.

Semble, per Wilson, C. J., that a writ of error was the proper remedy, and that, notwithstanding the Judicature Act, it would lie in the first instance to either the Queen's Bench or Common Pleas Division, and not to the Court of Appeal. Remarks as to what constitutes a Superior or Inferior Court. *Ib.*

By the Dominion Act 32 and 33 Vict. c. 29. s. 44, the selection of jurors in criminal cases is authorized to be in accordance with the provincial laws, whether passed before or after the coming into force of the B. N. A. Act, subject, however,

to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act. By the Provincial Acts 42 Vict. c. 14, and 44 Vict. c. 6, the mode of selection of jurors in criminal cases, as provided by C. S. U. C. c. 31, as amended by 26 Vict. c. 44, was changed by excluding the clerk of the peace as one of the selectors, and requiring the selection to be made only from those qualified to serve as jurors whose surnames began with certain alphabetical letters, instead of from the whole body of those competent to serve as previously required. The jury in question were selected under these Provincial Acts. Semble, that the 32 and 33 Vict. c. 29, D., was not ultra vires of the Dominion Parliament as being a delegation of their powers, and that the selection made in accordance with the Provincial Acts, was valid. *Ib.*

Quære, whether the selection and summoning of jurors is a matter of procedure, or relates to the constitution and organization of criminal courts. *Ib.* See next case.

By 32 and 33 Vict. c. 29, sec. 44, D., every person qualified and summoned to serve as a juror in criminal cases according to the law in any province, is declared to be qualified to serve in such province, whether such laws were passed before the B. N. A. Act or after it subject to, and in so far as such laws are not inconsistent with any Act of the Parliament of Canada. By 42 Vict. c. 14, (O.) and 44 Vict. c. 6 (O.), the mode of selecting jurors in all cases, formerly regulated by 26 Vict. c. 44, was changed. The jury was selected according to the Ontario Statutes, and the prisoner challenged the array, to which the crown demurred, and judgment was given for the crown. The prisoner was found guilty and sentenced, and he then brought error:—Held, per Hagarty, C. J., that the Dominion Statute was not ultra vires by reason of its adopting and applying the laws of Ontario as to jurors to criminal procedure. *Regina v. O'Rourke*, 1 O. R., Q. B. D. 464.

Semble, that under s. 139, Con. Stat. U. C. c. 31, where no indifference or fraudulent dealing of the sheriff is shewn, any irregularities are not assignable for error. *Ib.*

Per Armour and Cameron, JJ. The objection raised by the prisoner was not a good ground of challenge to the array. *Ib.*

Quære, whether, when such a question has been reserved by a judge at the trial, it can afterwards be made the subject of a writ of error. *Ib.*

XIV. EVIDENCE.

Held, that a magistrate cannot take judicial notice of Orders in Council, or their publication, without proof thereof by production of the official Gazette, and therefore that a conviction was bad which was made without such evidence, that the Canada Temperance Act of 1878 was in force in the county pursuant to the terms of s. 96 thereof. *Regina v. Bennett*, 1 O. R., Q. B. D. 445.

Held, Armour, J., diss., that the evidence of a wife is inadmissible, on the prosecution of her husband for refusal to support her, under 32-33 Vict. c. 20, s. 25. *Regina v. Bissell*, 1 O. R., Q. B. D. 514.

Upon a prosecution for uttering forged notes, the deposition of one S. taken before the police

magistrate on the preliminary investigation was read, upon the following proof that S. was absent from Canada:—R. swore that S. had a few months before left his, (R.'s) house where she (S.) had for a time lodged, that she had since twice heard from her in the U. S. A., but not for six months. The chief constable of Hamilton, where the prisoner was tried, proved ineffectual attempts to find S. by means of personal enquiries in some places, and correspondence with the police of other cities. S. had for some time lived with the prisoner as his wife:—Held, upon a case reserved, Cameron, J., diss., that the admissibility of the deposition was in the discretion of the Judge at the trial, and that it could not be said that he had wrongly admitted it. *Regina v. Nelson*, 1 O. R., Q. B. D. 500.

Per Patterson, J. A. Remarks upon the general right of a person charged before a magistrate with an indictable offence to call witnesses for his defence, and of a person whose extradition is demanded to shew by evidence that what he is charged with is not an extradition crime:—Sembly, that the evidence here offered, as stated in the report of the case, was not improperly rejected. *In re Phipps*, 8 A. R. 77.

Refusal of witness to answer on the ground that he may criminate himself.—Right to require oath of witness: see *Power v. Ellis*, 6 S. C. R. 1.

See *Theal v. The Queen*, 7 S. C. R. 397, p. 187.

XV. ERROR.

See *Regina v. Goodman et al.*, 2 O. R. 468, p. 189; *Goodman et al. v. Regina*, 3 O. R. 18, p. 189; *Regina v. O'Rourke*, 32 C. P. 388, p. 189; *S. C.* 1 O. R. 464, p. 190.

XVI. APPREHENSION AND ARREST OF OFFENDERS.

The prisoner was arrested in Toronto, upon information contained in a telegram from England, charging him with having committed a felony in that country, and stating that a warrant had been issued there for his arrest:—Held, that a person cannot, under the Imperial Act 6 & 7 Vict. c. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and endorsed by a judge of a Superior Court in this country. Such warrant must disclose a felony according to the law of this country, and Sembly, that the expression "felony, to wit, larceny," is insufficient. The prisoner was therefore discharged. *Regina v. McHolme*, 8 P. R. 452.—Cameron.

XVII. COSTS AND EXPENSES OF CRIMINAL JUSTICE.

Where an indictment for obstructing a highway had been removed by certiorari, at the instance of the private prosecutor, into this court, and defendant had been acquitted:—Held, that there was no power to impose payment of costs on such prosecutor. The court, however, has power to make payment of costs a condition of any indulgence granted in such a case; such as the postponement of the trial, or a new trial. *Regina v. Hart*, 45 Q. B. 1.

Held, that the liability of the crown to the payment of expenses connected with the administration of criminal justice in the province out of the consolidated revenue fund is restricted, under R. S. O. c. 86, s. 1, to such expenses as are mentioned in the schedule to the Act; and that the county, under R. S. O. c. 85, is required to pay all other proper expenses connected therewith:—Held, also, that the county attorney of York, though not clerk of the peace, is an officer coming within the said c. 85, whose expenses form part of the expenses of the administration of criminal justice. Where, therefore, the account of the county attorney of York, for the quarter ending 31st December, 1879, for expenses connected with the administration of criminal justice, was audited by the county board of audit and paid, but certain of the items were disallowed by the provincial treasurer as not payable by the crown out of the consolidated revenue fund, not being contained in the schedule, and the board of audit, therefore, in auditing the county attorney's account for a subsequent quarter, deducted therefrom the amount of said disallowed items, a mandamus was granted to the board to rescind their order for such deduction. *Re Fenton, County Crown Attorney for the County of York, and Board of Audit of the County of York*, 31 C. P. 31.

See *In re Stanton and the Board of Audit for the County of Elgin*, 3 O. R. 86, p. 166.

CROPS.

RIGHTS OF TENANTS—See LANDLORD AND TENANT.

Right of married woman to crops on land owned by her and occupied by her and her husband. See *Ingram v. Taylor*, 46 Q. B. 52; 7 A. R. 216.

Where crops produced from the land after the 1st November, 1879, were distrained, and the plaintiffs claimed them under a chattel mortgage, given on 31st May, 1880, of such crops which had then been just sown:—Held, that the growing crops passed by the chattel mortgage to the plaintiffs, who were entitled to recover for them as against the defendants. *Laing et al v. Ontario Loan and Savings Co.*, 46 Q. B. 114.

Crops to be sown upon certain land may be the subject of sale as any other after-acquired property, and the property in them will pass, when sown, if they are so described as to be capable of being identified when acquired. *Grass et al v. Austin*, 7 A. R. 511.

Right to crops of purchaser of land in mortgage suit. See *McDowall v. Phippen*, 1 O. R. 143.

As to growing crops comprised in Chattel Mortgages. See *Hamilton v. Harrison*, 46 Q. B. 127, p. 86; *Grass et al v. Austin*, 7 A. R. 511, p. 89.

See also *Cleaver v. The North of Scotland Canadian Mortgage Co.*, 27 Chy. 508.

CROSS BILL.

See PLEADING.

CROWN.

- I. ESCHEAT—See ESCHEAT.
- II. PETITION OF RIGHT—See PETITION OF RIGHT.
- III. CROWN LANDS—See CROWN LANDS.
- IV. CROWN TIMBER—See CROWN LANDS.

Proceedings by attachment against absconding debtor for debt due to the crown. See *Regina v. Stewart*, 8 P. R. 297, p. 2.

Right of crown to plead prescription. See *Chevrier v. The Queen*, 4 S. C. R. 1.

The maxim that the crown can do no wrong applies to alleged tortious acts of the officers of a public department of Ontario. See *The Muskoka Mill Co. v. The Queen*, 28 Chy. 563.

The Statute of Limitations was held not to be a bar to an action, though brought by the crown in its capacity as trustee of the land in question in the suit. *Attorney-General v. Midland R. W. Co.*, 3 O. R., Chy. D. 511.

Per Ritchie, C.J. That neither the engineer nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of Canada, have any power or authority, express or implied under the law, to bind the crown to any contract or expenditure not specially authorized by the express terms of contract duly entered into between the crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract. *C'Brien v. The Queen*, 4 S. C. R. 529.

As to liability of the crown for the negligence of its servants. See *Regina v. McFarlane*, 7 S. C. R. 216.

CROWN LANDS.

- I. RIGHTS BEFORE ISSUE OF PATENT, 193.
- II. RIGHTS OF GRANTEES, 193.
- III. CROWN TIMBER.
1. *Rights of Licensees*, 195.
- IV. POSSESSION OF—See LIMITATION OF ACTIONS AND SUITS.

I. RIGHTS BEFORE ISSUE OF PATENT.

A by-law passed by a municipal corporation cannot have the effect of taking any lands of the crown in addition to those appropriated by the crown for the purpose of highways in order to the opening up of the country. Neither can parties in possession of crown lands before patent issued dedicate any portion of the same: parties so in possession, however, may so far bind themselves by their acts as that when a patent shall issue to them the lands granted would be bound by any right or easement to which their sanction has been obtained. *Rae v. Trim*, 27 Chy. 374.

See also *Watson v. Lindsay et al*, 27 Chy. 253; 6 A. R. 609.

II. RIGHTS OF GRANTEES.

In a patent from the crown, of lots 16 and 17, in the 11th concession of Snowdon, the patentee

was described as "a free grant settler"; but the patent on its face purported to grant the land absolutely and unconditionally, and did not contain the statements required by sec. 16 of the Free Grant and Homesteads Act, R. S. O. c. 24; and there was no evidence that the patentee ever was a locatee of the land under said Act, or that the crown intended issuing the patent thereunder:—Held, that the land must be deemed to have been granted absolutely and unconditionally. *Semble*, that the patent might have issued under sec. 12 of the Public Lands Act, R. S. O. c. 23. *Canada Permanent Loan and Savings Co. v. Taylor*, 31 C. P. 41.

The Ontario, Simcoe, and Huron Railway Company, (afterwards changed to "The Northern Railway of Canada,") in the course of the construction of their roadway, acting in assumed and alleged pursuance of the powers conferred on the company by its charter, entered upon and took possession of certain government lands held by the principal officers of Her Majesty's Ordnance for ordnance purposes, and proceeded to construct their road thereon. Afterwards negotiations were opened between the company and the principal officers for acquiring such right of way, in the course of which numerous letters passed between the parties and between the several departments connected with the Ordnance Department, from which it appeared that the parties concerned had arrived at the conclusion that the company were acting within their statutory powers, and that all the department could require was, compensation for the land taken. Subsequently all these lands were, by the Imperial Government, ceded to the Government of Canada, and in the year 1875 it was ascertained that the sum for which the government held a lien upon the road amounted to £600,000; and by an Act of the Legislature of that year that claim was compromised by the government for £100,000 sterling, which was paid. In the year 1856 or 1857, this company agreed with the Grand Trunk Railway Company for the use of a portion of this land for the purposes of the line of the latter company, who, it was shewn, had entered upon and continued in the use of this land until 1879, when the Credit Valley Railway Company, with a view of obtaining an entrance into the City of Toronto, entered upon this tract of land, and were proceeding to construct their line of road thereon. Upon a bill filed by the Grand Trunk Railway Company an interlocutory injunction was granted to restrain the further construction of the Credit Valley Railway, until the hearing, when the injunction was made perpetual, the court being of opinion that the Northern Railway Company, under their dealings with the Board of Ordnance, and under the various statutory enactments appearing in the case, had acquired an absolute title to the land in question, free from any lien in respect thereof. *The Grand Trunk R. W. Co. of Canada v. The Credit Valley R. W. Co. of Canada et al.*, 27 Chy. 232.

Where the crown lands commissioner had erroneously returned certain lands to the municipal officers as patented, whereas, although a patent had been prepared, it had never been intended to be operative, nor been delivered to the grantee, B., who had paid only a part of the purchase-money, and the lands were afterwards sold for taxes:—Held, per Ferguson, J., B. having assigned his interest, and the assignee having sur-

rendered his interest to the crown, before the issue of the patent to M., it could not be said that at the time of the issue of the patent to M., there was any "adverse claim" to the lands in question within 23 Vict. c. 2, s. 22, so as to debar the commissioner from cancelling the patent to B. under that section. *O'Grady v. McCaffray*, 2 O. R., Chy. D. 309.

Since 16 Vict. c. 182, s. 56, a tax sale of unpatented lands conveys to a purchaser only such rights in respect of the land as the original locatee enjoyed. *Id.*

L., in 1875, applied for a homestead entry for the S. W. $\frac{1}{4}$ of sec. 30, township 6, range 4 west, pre-empted by F., and paid \$10 fee to a clerk at the office, but was subsequently informed by the officers of the crown that his application could not be recognized, and was refunded the \$10 he had paid. F. subsequently paid for the land by a military bounty warrant in pursuance of s. 23 of 35 Vict. c. 23. L. entered upon the land and made improvements. In 1878, after the conflicting claims of F. and L. had been considered by the officers of the crown, a patent for this land was granted by the crown to F., who brought an action of ejectment against L. to recover possession of the said land. F., at the trial, put in, as proof of his title the letters patent, and L. was allowed, against the objection of F.'s counsel, to set up an equitable defence, and to go into evidence for the purpose of attacking the plaintiff's patent as having been issued to him in error, and by improvidence and fraud. The judge, who tried the case without a jury, rendered a verdict for the defendant:—Held, on appeal, reversing the judgment of the Court of Queen's Bench (Manitoba), that L. not being in possession under the Statute, had no parliamentary title to the possession of the land, nor any title whatever that could prevail against the title of F. under the letters patent. *Farmer v. Livingston*, 5 S. C. R. 221.

As to the right of a patentee of land on the bank of a river where free access to the public is reserved. See *Hawkins v. Mahaffy*, 29 Chy. 326.

See *Booth v. McIntyre*, 31 C. P. 183, *infra*.

III. CROWN TIMBER.

1. Rights of Licensees.

The plaintiff herein a timber licensee, sold his interest in the license and limits to one W., who entered and cut timber, but the transfer was not proved, and by the regulations of the Crown Lands Department all transfers were to be in writing and subject to their approval, and were to be valid only from such approval:—Held, that the legal title to the limits and timber thereon was in the plaintiff, and that W.'s possession was the plaintiff's, who was entitled to maintain an action for damage done to the limits. *Booth v. McIntyre et al*, 31 C. P. 183.

Held, that the Canada Central Railway acquired under their charter, granted by the Act 19 & 20 Vict. c. 112 and subsequent Acts relating thereto passed prior to confederation, the right, which was preserved by s. 109 of the B. N. A. Act, to enter on the Crown lands in the Province of Ontario on the line of the railway included in a subsequent timber license granted to the plain-

tiff, and to cut the timber within six rods of either side thereof, without any restriction as to obtaining the consent of the Lieutenant-Governor in council. *Id.*

Held, Armour, J., dissenting, that the timber licenses, claimed by the plaintiff, as licensee of the Ontario Government, were subject to the right of the Canada Central Railway Company, acquired before confederation, to construct their road across the crown lands, over which the licenses in question extended; and that the defendants, assignees of the railway company, were therefore not liable in trespass for entering upon and cutting timber on the said limits in prosecution of the work of building the said railway. *Foran v. McIntyre et al*, 45 Q. B. 288.

CROWN TIMBER.

See CROWN LANDS.

CUMMINGS ISLAND.

See *Regina v. The Corporation of the County of Carlton*, 1 O. R. 277.

CUSTOM AND USAGE.

Quære, whether evidence as to how contracts for artesian wells were usually made in Barrie, should have been received. *The Barrie Gas Co. v. Sullivan*, 5 A. R. 110.

The plaintiffs alleged that it was the custom of agents to give each other credit for premiums on reinsurance and to settle at the end of the month, when the balance, if any, was handed by one to the other but no knowledge by defendants of such a course of dealing, nor such a course of dealing on the part of their agents was proved:—Held, that even if such a custom had been proved to exist between local agents, it would not be binding on the company, unless authorized by it. *Western Assurance Co. v. Provincial Ins. Co.*, 5 A. R. 190.

Evidence of custom in foreign country rejected where the contract was made in Ontario. See *Williams v. Corbey et al*, 5 A. R. 626.

Per Gwynne, J. The evidence in this case established the existence of a usage to tow down the river, as far as might be deemed necessary having regard to the state of the wind and weather, sometimes beyond the traverse, but ordinarily, at the date of the departure of the plaintiff's vessel, at least as far as the traverse. *The Provincial Ins. Co. of Canada v. Connolly*, 5 S. C. R. 258.

Custom of Paris. See *Pilon v. Brunet*, 5 S. C. R. 318.

See *Murton v. The Kingston and Montreal Forwarding Co.*, 32 C. P. 366, p. 83.

DAMAGES.

I. IN ACTIONS ON CONTRACTS.

1. For Non-delivery of Goods.

(a) Carriage of Goods, 197.

(b) *Sale of Goods*—See SALE OF GOODS—TIMBER.

2. *Liquidated or Penal*—See PENALTY BY CONTRACT.

II. IN ACTIONS ON COVENANTS.

1. *Covenants for Title*—See COVENANTS FOR TITLE.

2. *In Leases*—See LANDLORD AND TENANT.

III. IN ACTIONS FOR PERSONAL INJURIES—See NEGLIGENCE.

IV. IN ACTIONS FOR INJURY TO PROPERTY.

1. *Liability of Carriers*—See CARRIERS—RAILWAYS AND RAILWAY COMPANIES.

2. *Distress*—See DISTRESS.

3. *Lateral Support*—See LATERAL SUPPORT.

4. *Against Railway Companies*—See RAILWAYS AND RAILWAY COMPANIES.

5. *Trespass*—See TRESPASS.

6. *By Drainage*—See WATER AND WATER COURSES.

V. IN ACTIONS FOR DOWER—See DOWER.

VI. IN ACTIONS ON WARRANTY—See WARRANTY.

VII. COMPENSATION IN SUITS FOR SPECIFIC PERFORMANCE—See SPECIFIC PERFORMANCE.

VIII. ASSESSMENT OF DAMAGES.

1. *Notice of*—See TRIAL.

2. *By Jury*—See JURY.

IX. PRACTICE IN APPELLATE COURTS, 198.

X. EXCESSIVE DAMAGES—See NEW TRIAL.

I. IN ACTIONS ON CONTRACT.

1 *For Non-delivery of Goods.*

(a) *Carriage of Goods.*

The plaintiff, who lived at Meaford, sold a quantity of barley by sample to one D, a brewer in Toronto, and shipped same by the defendants' railway, consigned to D at Brock street, signing a consignment note and receiving a shipping receipt from the company, which stipulated such receipt should not be transferable, but that as to grain consigned to defendants' elevator at Toronto defendants would grant a negotiable receipt, and was subject to certain conditions, set out in the report. The barley was duly carried to Toronto and warehoused by defendants in their elevator there, under, as they contended, the right conferred therefor by the conditions; and they then tendered grain of the same grade as plaintiffs, which D refused to accept:—Held, that the consignment note and shipping receipt, which constituted the contract between the parties, shewed that a distinction was made between grain consigned to the defendant's elevator and other grain; the conditions as to warehousing, set out in the report, being only applicable to the former, and that the plaintiff was therefore entitled to recover the damages sus-

tained by the non-delivery of the specific grain shipped. *Leader v. The Northern R. W. Co. et al.*, 3 O. R., C. P. D. 92.

IX. PRACTICE IN APPELLATE COURTS.

The Court on Appeal directed a verdict to be entered for the plaintiff against a tavern keeper for selling liquor to her husband after being forbidden by the plaintiff, his wife, to do so, but referred it back to the County Court Judge to assess the damages, declining to follow the course adopted in *Denny v. The Montreal Telegraph Co.*, 3 A. R. 628. *Austin v. Davis*, 7 A. R. 478.

In an action of damages, if the amount awarded in the court of first instance is not such as to shock the sense of justice and to make it apparent that there was error or partiality on the part of the judge (the exercise of a discretion on his part being in the nature of the case required) an appellate court will not interfere with the discretion such judge has exercised in determining the amount of damages. *Levi v. Reed*, 6 S. C. R. 482.

DEATH.

I. PRESUMPTION AS TO—See EVIDENCE.

II. OF PARTNER—See PARTNERSHIP.

Death of sole defendant—Adding parties. See *McCarthy v. Arbuckle*, 31 C. P. 48.

DEBENTURES.

I. MUNICIPAL—See MUNICIPAL CORPORATIONS.

II. RAILWAY—See RAILWAYS AND RAILWAY COMPANIES.

Action on a debenture, by which the defendants agreed to pay to the bearer £200 stg. at the office of a named bank and on a named day, upon presentation and surrender there of the debenture. Averment of performance of all conditions precedent. Breach, non-payment of the principal sum:—Held, by Osler, J., and affirmed by the full court, (1) that the presentation and surrender of the debenture at such place and date were conditions precedent, and the performance of such conditions having been averred in the declaration, a replication alleging presentation on a later day was a departure; (2) that it was no objection to a replication that it shewed for the first time that interest only was claimed, for that being merely an accessory to the principal, need not be claimed as damages:—Held, also, that a plea which, after traversing the presentation of the debenture modo et formā, alleged it was afterwards paid and was then duly surrendered to the defendants, was a good plea, as the plaintiffs, by exception to it, admitted payment of the principal sum, which would include the nominal damages, if any, alone recoverable for its detention, while the surrender of the debenture would shew that the payment was in satisfaction and discharge of the debt, if

not of the damages also : that it was no answer to the plea to say that the surrender before the damages were paid was by mere oversight and inadvertence so long as it appeared to be intentional ; but that it would be a good answer to say that such delivery was on the express agreement that the right to damages was reserved :—Held, also, that after failure to make a due presentation, there could be no recovery until a demand was made for payment, which must be made on the defendants. *Osborne v. Preston and Berlin R. W. Co.*, 9 C. P. 241, and *Fellowes v. Ottawa Gas. Co.*, 19 C. P. 174, commented upon. *The Montreal City and District Savings Bank v. The Corporation of the County of Perth*, 32 C. P. 18.

DECEIT.

See FRAUD AND MISREPRESENTATION.

DECLARATION.

IN PLEADINGS—See PLEADING.

DECLARATION OF OFFICE.

See MUNICIPAL CORPORATIONS.

DECLARATION OF RIGHT.

To exclusive use of ferry. See *Jellett v. Anderson et al.*, 7 A. R. 341. Reversed in Supreme Court 3rd May, 1883.

DECREE.

I. OF FORECLOSURE—See MORTGAGE.

II. ON BILL FOR SALE—See MORTGAGE.

III. IN OTHER SUITS—See PRACTICE.

DEDICATION.

OF ROAD—See WAY.

A municipal corporation laying out a square park, on lands acquired by them untrammelled any trust as to its disposal, may deal with it in any manner authorized by section 509 of the Municipal Act, R. S. O. c. 174, at least where no private rights have been acquired in consequence of their action ; but they cannot so deal with lands dedicated by the owner for a special purpose, which case is provided for by section 467. Whether the dedication arises only from the act of the owner, or by express grant, the municipality must accept it, if at all, for the purpose indicated. The owner of land dedicated to the public a square by filing a plan upon which were the words, "Square to remain always free from any erection or obstruction :"—Held, that the municipality had no power to close up part thereof, and to dispose of it to trustees of a church. *In re Peck and the Corporation of the Town of Galt*, 46 Q. B. 211.

A by-law passed by a municipal corporation cannot have the effect of taking any lands of the crown in addition to those appropriated by the crown for the purpose of highways in order to the opening up of the country. Neither can parties in possession of Crown lands before patent issued dedicate any portion of the same : parties so in possession, however, may so far bind themselves by their acts as that when a patent shall issue to them the lands granted would be bound by any right or easement to which their sanction has been obtained. *Rae v. Trim*, 27 Chy. 374.

In 1856, the owner of lot five registered a plan shewing a sub-division of it into six lots with a lane running through the centre, which was intended for the use of the occupants of the lots adjoining it. He afterwards sold some of the lots, but they were all re-conveyed to him. The lots were always fenced in as one property till 1876, when he sold all the lots and the lane to a bank, by whom a building was erected, the fences remaining as they had been until removed when the building was in progress, and being afterwards replaced by a new closed fence. In 1880, at the instance of one M., the owner of the adjoining lot four, who had recently, at his own expense, laid out a lane across his lot, in continuation of the lane in lot five, and conveyed it to the corporation, a by-law was passed by the council opening the lane on lot five. It was shewn that M. was the only person interested in having the lane opened. Osler, J., quashed the by-law on the ground that it had not been passed in the interest of the public, but simply to subserve the interests of an individual :—Held, dismissing the appeal, that the registration of a plan of a sub-division of a town lot and sales made in accordance with it does not constitute a dedication of the lands thereon to the public, and the council had, therefore, exceeded their powers in passing the by-law in question :—Held, also, that the by-law, being passed in the interest of a particular individual, was properly quashed. *In re Morton and the Corporation of the City of St. Thomas*, 6 A. R. 323.

See also *Van Koughnet v. Denison et al.*, 28 Chy. 485 ; 1 O. R. 349.

DEED.

I. EXECUTION.

1. *Seal*, 201.

II. ALTERATION, 201.

III. CONSTRUCTION AND OPERATION.

1. *Description of Land*.

(a) *Generally*, 201.

(b) *Boundaries*—See WATER AND WATER COURSES.

2. *Description of Parties*, 202.

3. *Conditions, Reservations and Exceptions*, 202.

4. *Under Short Forms Act*, 203.

5. *Covenants in*—See COVENANT—COVENANTS FOR TITLE.

6. *Estate Created*—See ESTATE.

7. *Other Cases*, 203.

IV. RECTIFYING AND VARYING, 204.

V. EVIDENCE OF LOSS OF DEED—See EVIDENCE.

VI. PRESUMPTIONS AS TO DEEDS—See EVIDENCE.

VII. ESTOPPEL BY DEED—See ESTOPPEL.

VIII. REGISTRATION OF—See REGISTRY LAWS.

IX. PARTICULAR DEEDS—See THE SEVERAL TITLES.

I. EXECUTION.

1. *Seal*.

The testimonium clause in a power of attorney declared that the principal set his hand and seal to the instrument. The attestation clause declared that it was signed and sealed in the presence of a subscribing witness, and opposite the signature of the principal was a visible impression made by the pen in the form of a scroll in which was inscribed the word "seal."—Held, a sufficient sealing of the document. *Re Bell and Black*, 1 O. R., Chy. D. 125.

II. ALTERATION.

Alteration of discharge of mortgage by mortgagee's agent. See *Sayles v. Brown*, 28 Chy. 10.

H. obtained from his debtor an absolute conveyance of land as security, which was attacked by the plaintiff, who had subsequently recovered an execution against the grantor, as being a fraudulent preference. It was shewn that the deed, after its execution, had been altered by the grantee so as to convey the correct lot (22 instead of 122), the only lot owned by the grantor but no re-execution or acknowledgment took place; the grantor, however, accepted a lease from H. of the correct lot, which he afterwards surrendered to H.:—Held, that as the grantor, according to the ruling in *Sayles v. Brown*, 28 Chy. 10, could not claim to have the conveyance vacated, so neither could his creditor, the plaintiff. *Sommerville v. Rae*, 28 Chy. 618.

III. CONSTRUCTION AND OPERATION.

1. *Description of Land*.(a) *Generally*.

The premises intended to be conveyed by a tax deed, from the warden and treasurer to the plaintiff, were described therein as 180 acres of the east halves of two lots "commencing at the front east halves of said lots, taking the full breadth of each half respectively and running northwards so far as required, to make ninety acres of each half:"—Held, that "northwards" might be rejected, being evidently a mistake for westward. *Ferguson v. Freeman*, 27 Chy. 211.

A description of land in a deed by reference to other conveyances for a fuller description is sufficient. *In re Treleven and Horner*, 28 Chy. 624.

Held, that the words "be the same more or less," following the description of the quantity of

land, improperly inserted in a sheriff's deed might be rejected as surplusage. *Nelles v. White*, 29 Chy. 338.

See also *Foott v. Rice et al.*, 4 O. R. 94.

2. *Description of Parties*.

The deed to the defendant company described it by its original name of P. H. L. & B. R. Co., when in fact its name had then been changed:—Held, a sufficient descriptio personæ, to enable the company to take, though it might not be sufficient to sue in. *Grand Junction R. W. Co. v. Midland R. W. Co.*, 7 A. R. 681.

3. *Conditions, Reservations and Exceptions*.

Defendant conveyed to his son J. L., jun., the east half of a lot, "reserving from the operation of these presents unto the said parties of the first and second parts (the latter being defendant's wife), during their joint lives, and during the life of the survivor, one acre of the said lot hereby conveyed, the same acre to be taken in any part of the lands hereby conveyed, where the said parties of the first and second parts see fit." Defendant continued to live on the lands with his son till the latter's death, in 1876. Several years before his death, J. L., jun., built a small house on the land, which was occupied by his men till his death. After his son's death the defendant went off the land, but returned in about a year, and lived in the small house built by his son, and improved the same. The mortgagees of the son sold to the plaintiff under the power in their mortgage, and the defendant, at the sale to the plaintiff, on being asked, said he had not selected his acre, was then asked to do so, and then selected the part where he was living. The plaintiff was present and heard this, and his conveyance was "subject to the reservations contained in the deed from J. L., sen., (the defendant,) to J. L., jun.:"—Held, that the reservation in the deed from the defendant to his son was more properly an exception than a reservation: that an estate for the joint lives of the defendant and his wife, and for the life of the survivor, remained in the defendant; and he therefore was entitled to select the acre at any time, and was not bound to do so in the life-time of his son. *Burnham v. Ramsey*, 32 Q. B. 49, distinguished. *Lapointe v. Lafleur*, 46 Q. B. 16.

The estate in question had been conveyed to G. D. & L. P., between whom a partition had been made, not under seal, giving to L. P. the east half. Afterwards G. D. conveyed to the defendant his interest in the east half, and after the execution of the deed by the defendant to his son, L. P. by deed, reciting that by oversight there was no release from him of the east half, and that he was desirous of completing the son's title, released the east half to the son. It was contended that the defendant owned only an undivided moiety of the lot when he conveyed to his son, and that the plaintiff, claiming through the son, could recover an undivided moiety of the acre selected by the defendant; but:—Held, otherwise, for the plaintiff took his deed subject to the reservation in the defendant's deed to his son, and the deed from L. P. to the son would enure only to the benefit of the title conveyed to him by his father. *Id.*

The grantor conveyed certain lands to the grantee, his heirs and assigns, and by a proviso at the concluding part of the deed declared "nevertheless, that the above L. shall have no right to sell, alien, or dispose in any way whatsoever of the above-mentioned premises, but have only the use during his life-time, after which his children will have full right to the said property above mentioned."—Held, on demurrer, that such proviso was repugnant to the grant and habendum, in fee, and therefore void. *Lario v. Walker*, 28 Chy. 216.

By 18 Vict. c. 250, W. F. and his brother were authorized to sell certain entailed property in consideration of a non-redeemable rent representing the value of the property. On the 7th September, 1860, W. F., the appellant, and E. F., assigned to their brother, A. F., a piece of land forming part of the above entailed property, in consideration of a rente foncière of six pounds, payable the first day of October of each year. The deed was registered and contained the following stipulation: "But it is agreed that the assignee cannot alienate in any manner whatsoever the said land, nor any part thereof, to any person without the express and written consent of the assignors under penalty of the nullity of the said deed." The property was subsequently seized by a judgment creditor of A. F., and appellant opposed the sale and asked that the seizure be declared null, because the property seized could not be sold by reason of the above prohibition to alienate.—Held, on appeal, affirming the judgment of the court below, that the deed was made in accordance with the provisions of 18 Vict. c. 250, and being a purely onerous title on its face, the prohibition to alienate contained in said deed was void. Art. 970 C. C. L. C. *Quære*: Whether the substitutes may not, when the substitution opens, attack the deed for want of sufficient consideration. *Fraser v. Pouliot*, 4 S. C. R. 515.

See *Wilson v. Gilmer et al.*, 46 Q. B. 54, p. 234.

4. Under Short Forms Act.

The operation of an ordinary deed of bargain and sale under the Short Forms Act, R. S. O. c. 102, conveying lands to trustees considered and acted on. *Seatoq v. Lunney*, 27 Chy. 169.

Short form of lease. See *Emmett v. Quinn*, 27 Chy. 420; 7 A. R. 306.

See *McKay v. McKay*, 31 C. P. 1., p. 182.

7. Other Cases.

The owner of land conveyed a right of way over his land to the defendants in 1869, and the deed contained the following stipulation: "The company to make and maintain a farm crossing, with gates at the present farm lanes, the fence at crossing to be returned as much as possible." R. the company's engineer treated for the conveyance, but had no power to agree for a second crossing, though it was said he had promised if he should find a second crossing necessary he would, so far as in him lay, get it done, and the deed was executed upon this understanding.—Held, (reversing the decree of Proudfoot, V. C., 27 Chy. 95,) that the defendants could not be compelled to make a second crossing for

use in winter; and that, upon the construction of the words above set forth, they were bound to continue the crossing, not close it up or impair it or alter its character as a farm crossing, but were not obliged to keep it free from snow. *Proudfoot, V. C.*, dissenting. *Cameron v. Wellington, Grey, and Bruce R. W. Co.* 28 Chy. 327.

Per H.E. Taschereau and Gwynne, JJ., That a deed, taken under 9 Vict. c. 37, s. 17, before a notary (though not under the seal of the commissioners) from a person in possession, which was subsequently confirmed by a judgment of ratification of a Superior Court, was a valid deed, that all rights of property were purged, and that if any of the auteurs of the petitioner failed to urge their rights on the moneys deposited by reason of the customary dower, the ratification of the title was none the less valid. *Chevrier v. The Queen*, 4 S. C. R. 1.

See *Canada Permanent Loan and Savings Co. v. Taylor*, 31 C. P. 41, p. 194.

IV. RECTIFYING AND VARYING.

Held, that the evidence set out in the report of this case shewed that the agreement of the parties was that the plaintiff should have a deed with covenants merely, as distinguished from a quit claim deed, and that it was through the mistake of all the parties that the covenant as framed was entered into, and that the deed should be accordingly reformed by limiting the covenant to the grantor's own acts in the usual form. *McKay v. McKay*, 31 C. P. 1.

A mortgage which had been executed by the defendant I., reciting that it had been agreed to be given to secure notes held by the plaintiffs, and containing covenants for title, was reformed, on parol evidence, by substituting for one of the parcels inserted by mistake, which did not belong to I., another lot proved to be his at the time of creating the mortgage; and being the only other lot owned by him. *Bank of Toronto v. Irwin*, 28 Chy. 397.

Such a mortgage is not voluntary or without consideration so as to exclude reformation. *Id.*

The plaintiffs sought a rectification of the description of the premises covered by a mortgage to them, by including therein the water lots and dock property in front of the lots described in the mortgage. The plaintiffs relied on parol testimony, while the documentary evidence was all in favour of the defendant.—Held, affirming the decree of Spragge, C., 27 Chy. 68, that no case was made for a reformation of the mortgage. *Dominion Loan Society v. Darling*, 5 A. R. 576.

See also *Macdonald v. Worthington et al.*, 7 A. R. 531; 20 C. L. J. 67.

DEFAMATION.

I. PRIVILEGED COMMUNICATIONS, 205.

II. AFFECTING PERSONS IN TRADE OR BUSINESS, 206.

III. IMMORALITY AND UNFITNESS FOR SOCIETY, 206.

IV. SLANDER OF TITLE, 206.

V. PLEADING IN ACTIONS FOR, 207.

VI. PARTICULARS, 207.

VII. APOLOGY, 207.

I. PRIVILEGED COMMUNICATIONS.

Claim : That the defendant, an inspector of licenses, falsely and maliciously published of the plaintiff a circular which he caused to be sent to all licensed victuallers, &c., in the riding, containing the following words: "W. R. (and others) are in the habit of drinking intoxicating liquors to excess, and you are hereby notified that you are not to sell, give, &c., intoxicating liquors to the said parties, or to the wife, husband, child, employee, agent, or any member of the family or household of the said parties."

Defence : That the commissioners in good faith, intending to act within the scope of their powers, passed a resolution, "That no intoxicating liquors shall, under any pretence, be sold in any tavern, &c., to any person who has the habit of drinking intoxicating liquors to excess, or the wife, &c., of such person, or any person concerning whom notice had been given to the landlord by the husband, &c., of such person, or any justice of the peace or inspector, that such person is in the habit of drinking," &c. : that the licenses were issued to the persons to whom the notices were addressed, subject to the right of suspending them for breach of the resolution. And the defendant justified upon information obtained respecting the plaintiff, upon which he followed the terms of the resolution :—Held, on demurrer, that the license commissioners had no power to pass the resolution, and therefore that the defence was bad, for the communication was not privileged, and the defendant's belief in the validity of the resolution could not create any privilege. *Roberts v. Climie—Murphy v. Climie*, 46 Q. B. 264.

The plaintiff was assistant in the shop of C., a druggist, over which the defendant and her husband, a physician, lived, the latter being C.'s landlord and customer. The defendant having in the presence of a witness accused the plaintiff of having taken \$4 from her trunk upstairs, her husband told C. that the plaintiff must be discharged, or he would send him no more prescriptions. A meeting was, however, arranged between the parties in the presence of the witness, for the purpose, as they said, of an investigation. On this occasion the slanderous words were repeated, and the plaintiff was discharged from C.'s employment :—Held, that what was said at this meeting was privileged, and the case having been left to the jury generally a verdict for the plaintiff was set aside. *Hargreaves v. Sinclair*, 1 O. R., Q. B. D. 260.

The appellant, D., having been appointed chief post office inspector for Canada, was engaged, under directions from the postmaster general, in making enquiries into certain irregularities which had been discovered at the St. John post office. After making enquiries, he had a conversation with the respondent, W., alone in a room in the post office, charging him with abstracting missing letters, which respondent strongly denied. Thereupon the assistant postmaster was called in, and the appellant said : "I have charged Mr. W. with abstracting the letters. I have charged Mr. W. with the abstractions that have occurred from

those money letters, and I have concluded to suspend him." The respondent, having brought an action for slander, was allowed to give evidence of the conversation between himself and appellant. There was no other evidence of malice. The jury found that appellant was not actuated by ill-feeling toward the respondent in making the observation to him, but found that he was so actuated in the communication he made to the assistant postmaster :—Held, on appeal, 1. That the appellant was in the due discharge of his duty and acting in accordance with his instructions, and that the words addressed to the assistant postmaster were privileged. 2. That the onus lay upon respondent to prove that the appellant acted under the influence of malicious feelings, and as the jury found that the appellant had not been actuated by ill-feeling, the respondent was not entitled to retain his verdict, and the rule for a non-suit should be made absolute. *Dewe v. Waterbury*, 6 S. C. R. 143.

II. AFFECTING PERSONS IN TRADE OR BUSINESS.

A medical practitioner, registered in Great Britain but not in this province, cannot maintain an action against a person slandering him in his profession. See *Skirving v. Ross*, 31 C. P. 423.

The defendant spoke of the plaintiff, a miller and grain buyer, that one of the big millers (meaning the plaintiff) had run away owing money to him and others : that he, the defendant, had come in to catch the plaintiff, but that he had gone or cleared out. At the trial a non-suit was entered, on the objection that the words were not shewn to have been used with reference to the plaintiff's business, and no special damage was proved :—Held, that the nonsuit was wrong, for the words used cast an imputation upon the solvency and financial standing of the plaintiff, and it was for the jury to say whether they were spoken in reference to his business, and calculated to injure him therein. *Lott v. Drury*, 1 O. R., Q. B. D. 577.

See *Farmer v. Hamilton Tribune Printing and Publishing Co. et al.*, 3 O. R. 538, *infra*.

III. IMMORALITY AND UNFITNESS FOR SOCIETY.

To a statement of claim, charging the defendants with the publishing of the plaintiff in their newspaper that he had seduced and betrayed one B. P., and was a man unfit for the society of respectable people, &c., whereby the plaintiff was injured in his credit, &c., the defendants pleaded that the article was published bona fide and without malice, and for the public benefit, and in the usual course of the defendants' duty as public journalists, and was a correct, fair, and honest report of proceedings of public interest and concern :—Held, on demurrer, bad, for the publication complained of was in no sense for the public benefit, nor published in the course of defendants' duty. *Farmer v. Hamilton Tribune Printing and Publishing Co. et al.*, 3 O. R., Q. B. D. 538.

See *Palmer v. Solmes*, 45 Q. B. 15, p. 207.

IV. SLANDER OF TITLE.

See *The Ontario Industrial Loan & Investment Co. v. Lindsey et al.*, 3 O. R. 66 ; 4 O. R. 473.

V. PLEADING IN ACTIONS FOR.

In an action of libel the plaintiff alleged that the defendant had accused him in a newspaper article of having made false returns to the Government, in his business of distiller. To this the defendant pleaded justification:—Held, that the plaintiff was entitled to particulars of the defence intended to be set up under this plea. *Corcoran v. Robb*, 8 P. R. 49.—Dalton, Q. C.

In an action for libel the plea of not guilty was held inconsistent with a plea of apology and payment into Court, and was ordered to be struck out. *Doyle v. Owen Sound Printing Co.*, 8 P. R. 69.—Dalton, Q. C.

A declaration by a married woman for slander, imputing that she had committed incest and adultery with her father, and alleging as grounds of special damage (1), the loss of the consortium of her husband, (2), the loss of the society of friends, was Held, on demurrer, good, although the second ground was clearly insufficient, in not naming the friends. *Palmer v. Solmes*, 45 Q. B. 15.

Held under R. S. O. c. 125, that in an action for a tort (in this case the action was for slander) committed by a wife during coverture, the husband is not a proper party, but the wife must be sued alone. *Amer v. Rogers et ux.*, 31 C. P. 195.

VI. PARTICULARS.

In an action for slander in charging the plaintiff with theft, particulars were ordered shewing the person to whom the words were spoken, or if such person were unknown, or the words were spoken to the plaintiff, then the name of any person who was present and heard or might have heard the words spoken. *Thornton v. Capstock*, 9 R. R. 535.—Cameron.

See *Corcoran v. Robb*, 8 P. R. 49, *supra*

VII. APOLOGY.

See *Doyle v. Owen Sound Printing Co.*, 8 P. R. 69, *supra*.

DELAY.

See LACHES.

DELIVERY.

OF POSSESSION—See SALE OF LAND.

DEMURRER.

See PLEADING.

DEPARTURE IN PLEADING.

See PLEADING.

DEPOSITIONS.

UNDER COMMISSIONS—See EVIDENCE.

Admissibility of, on proof of absence of witness. See *Regina v. Nelson*, 1 O. R. 500.

DEPUTY CLERK OF THE CROWN.

Where an examination of parties pursuant to R. S. O. c. 50 s. 161, takes place before a deputy clerk of the Crown, though not designated in the order as acting in his official capacity, the fees for such examination are payable in stamps, and not in money. *Denmark v. McConaghy*, 8 P. R. 136.—Osler.

DEPUTY SHERIFF.

See SHERIFF.

DESCENT.

The proviso in the statute of distributions that "There be no representations admitted amongst collaterals after brothers' and sisters' children," excludes the children of a deceased nephew of the intestate. *Crowther et al. v. Cawthra et al.*, 1 O. R., Chy. D. 128.

DESCRIPTION OF GOODS.

IN BILLS OF SALE AND CHATTEL MORTGAGES—
See BILLS OF SALE AND CHATTEL MORTGAGES.

DESCRIPTION OF LAND.

I. IN DEEDS—See DEED.

II. BOUNDARIES—See WATER AND WATER COURSES.

DESERTION.

See HUSBAND AND WIFE.

DEVISE.

See WILL.

DICKINSON'S ISLAND.

Dickinson's Island on Lake St. Francis is part of the county of Glengarry. *Regina v. Duquette*, 9 P. R. 29.—Osler.

DIRECTORS.

See CORPORATIONS—RAILWAYS AND RAILWAY COMPANIES.

DISCHARGE OF MORTGAGE.

See MORTGAGE.

DISCLAIMER.

I. OF TITLE—*See* EJECTMENT.II. IN CONTROVERTED ELECTIONS—*See* MUNICIPAL CORPORATIONS.

DISCOVERY.

OF DOCUMENTS—*See* EVIDENCE.

Obtaining discovery by cross bill. *See Direct Cable Co. v. Dominion Telegraph Co.*, 28 Chy. 618.

Adding parties in the master's office for the purpose of discovery. *See Hopper v. Harrison*, 28 Chy. 22.

DISQUALIFICATION.

I. OF MEMBERS OF MUNICIPAL COUNCILS—*See* MUNICIPAL CORPORATIONS.II. OF PARLIAMENTARY CANDIDATES—*See* PARLIAMENT.III. OF SCHOOL TRUSTEES — *See* PUBLIC SCHOOLS.IV. OF MAGISTRATES—*See* JUSTICES OF THE PEACE.

Where two shareholders, who were also provisional directors, and who were candidates for re-election, were appointed scrutineers, and directors were then elected excluding the plaintiff :—Held, that the duty of the scrutineers was so plainly in conflict with their interest as candidates for the directorate, that they were disqualified from so acting. *Dickson v. McMurray*, 28 Chy. 533.

DISTRESS.

1. FOR RENT.

1. *What Constitutes a Distress*, 210.2. *Exemptions for Benefit of Trade*, 210.3. *Seizure of Goods Subject to Chattel Mortgage*, 210.4. *Double Value*, 210.5. *Wrongful Distress*.(a) *Justification as Owner*, 211.

II. FOR MORTGAGE MONEY, 211.

III. POWER OF DISTRESS FOR ANNUITY, 213.

IV. FOR MUNICIPAL TAXES—*See* ASSESSMENT AND TAXES.

V. DAMAGE FEASANT, 213.

VI. UNDER MAGISTRATES WARRANT — *See* JUSTICES OF THE PEACE.VII. LANDLORD'S CLAIM FOR RENT ON EXECUTION—*See* SHERIFF.

1. RENT.

1 *What Constitutes a Distress.*

The plaintiff was mortgagee of certain goods of one F. G., a tenant of his father, the defendant C. G. The landlord on the 17th February, 1883, went to the house of the tenant, and declared that he seized everything for rent. He touched nothing and made no inventory. On 24th February he went again and told the tenant's wife that the property had been seized for rent, and to let no one take anything away, when she promised to do her best for him. On 5th March the plaintiff took possession under his mortgage and removed the goods. A bailiff went the next day for taxes in arrear, and the landlord gave him a distress warrant to take goods for rent. The bailiff then took the goods which had been removed, and on the tenant's waiving an inventory, advertizing, &c., sold them within two days to a nephew of the landlord :—Held, that the landlord's two visits of 17th and 24th February did not amount to a distress. *Whimsell v. Giffard et al.*, 3 O. R., Q. B. D. 1.

2. *Exemptions for Benefit of Trade.*

The exemption from distress of goods entrusted to persons carrying on certain public trades, to exercise their trades upon them, is a privilege grounded on public policy for the benefit of trade. In this case saw-logs were taken to a saw-mill by the plaintiff, to be converted into lumber in the due course of business of the mill, and were distrained there for rent by defendant :—Held, that the business of sawing lumber for hire is a trade in which is exempted from distress for rent the property of a stranger brought in to be converted into lumber ; and that the plaintiff was entitled to recover, notwithstanding that one of the tenants of the sawmill appeared to have an interest with him in the saw-logs. *Patterson v. Thompson*, 46 Q. B. 7.—Reversed in appeal, 9 A. R. 326.

The defendant distrained for rent a reaping machine on premises leased by him to one G., from whom the plaintiff, an hotel keeper, had the use of the yard and stable. The machine had been left at the plaintiff's hotel about six months before by one R., an agent for the sale of reaping machines, when he was stopping there, and R. had never been at the hotel since, except perhaps on one occasion. The plaintiff was paid nothing for keeping the machine, nor did he assume any responsibility therefor. At the trial it was sought to prove that it was essential to the plaintiff's business to receive and keep such machines brought by his customers, but the evidence merely shewed that a refusal to do so would or might render his hotel less popular :—Held, reversing the judgment of the County Court, that the machine was not exempt from distress. *Mitchell v. Coffee*, 5 A. R. 525.

3. *Seizure of Goods Subject to Chattel Mortgage.*

Duty of tenant to protect. *See Herring v. Wilson*, 4 O. R. 607.

4. *Double Value.*

The defendant leased certain land to the plaintiff for a term, during which the latter was to

make improvements, and at the expiration of the term the value of such improvements, as well as the amount of the rent, was to be fixed by arbitration. The defendant having distrained for rent claimed to be due:—Held, that there being no fixed rent agreed upon there was no right of distress, and the defendant was therefore merely a trespasser and liable to damages to the actual value of the goods, but not to double their value, as it was not a case within 2 W. & M. Sess. 1, c. 5, sec. 5, which refers to the wilful abuse of the power of distress. *Semble*, that although there may be no rent in arrear until the same is fixed by arbitration, there cannot be said to be none due. *Mitchell v. Duffy*, 31 C. P. 266, 649.

Per Cameron, J. Where a plaintiff claims double value for distraining when no rent was due, he must make such claim at the trial, and ask to have the jury directed upon it. *Bell v. Irish*, 45 Q. B. 167.

5. Wrongful Distress.

(a) Justification as Owner.

Where a party distrained, as landlord, on goods which as a matter of fact had, by subsequent agreement between himself and the tenant, but before the distress, become his absolutely:—Held, that he might justify the taking on this latter ground. *Armour, J.*, dissenting, on the ground that the instrument under which the defendant claimed the goods, set out in the report, had not the effect of transferring the property in them to the defendant. *Bell v. Irish*, 45 Q. B. 167.

II. FOR MORTGAGE MONEY.

By a mortgage under the Short Forms of Mortgages Act, the interest was made payable on the 30th of January in each year, and the mortgage contained a power of distress for arrears of interest. On the 30th January, 1879, two years' interest was overdue, and on 23rd May following the defendants, under power of attorney from the mortgagee, as his agents, entered upon the mortgaged premises, and distrained the plaintiff's goods for arrears of interest. The plaintiff was tenant of the mortgagor, and had entered after the mortgage. The defendants notified the plaintiff that they had distrained, but they did not remove the goods or place any one in charge. On the 18th August following the defendants distrained, and sold the plaintiff's goods for \$8.75 and costs, being for a half year's interest, ending 30th July, 1879, in addition to the previous seizure and demand:—Held, that the defendants having abandoned the first seizure, could not seize a second time for the same demand:—Held, also, that the half year's interest claimed by the second seizure was not due by the terms of the mortgage, and that the distress was for that reason illegal:—*Quære*, whether the goods of a stranger could be seized under such a distress clause. *La Vassaire v. Heron et al.*, 45 Q. B. 7.

The distress clause in the Short Forms of Mortgages Act is merely a license to take the goods of the mortgagor; the intention being to provide in a concise referential manner for the disposal of the goods when seized in the same

manner as goods seized for rent. A mortgage made in pursuance of this Act, contained the following: "and the mortgagor doth release to the company all his claims upon the said lands, and doth attorn to and become tenant at will to the mortgagees, subject to the said proviso." It also provided that the mortgagees on default of payment for two months, might on one month's notice, enter on and lease or sell the lands; that they might distrain for arrears of interest, and that until default of payment, the mortgagors should have quiet possession:—Held, *Osler, J.*, dissenting, reversing the judgment of the Queen's Bench, 45 Q. B. 176, that though the relation of landlord and tenant may have been thereby created, yet there was no rent fixed for which there was power to distrain, and the plaintiffs therefore could not claim a landlord's right, as against an execution creditor, of a year's arrears of interest on their mortgage before removal by the sheriff. *Trust and Loan Co. v. Lumsden et al.*, 6 A. R. 286. Affirmed on appeal to Supreme Court.

A mortgage of land contained no attornment clause, and no provision expressly creating the relationship of landlord and tenant between the mortgagor and mortgagee, but it provided for possession by the mortgagor until default; that on default in payment of any one instalment for two months all should become due, and that on default in payment of any instalment the mortgagees might distrain therefor, and by distress warrant recover by way of rent reserved, as in the case of a demise of the said lands, so much as should be in arrear. The first instalment fell due on the 1st November, 1879, and the mortgagees being in possession, the mortgagees distrained therefor on the 6th October, 1880:—Held, that this right to distrain was a mere license, and did not warrant the taking of a stranger's goods upon the premises. *Semble*, per Cameron, J., that the mortgagees, on default, ceased to hold as tenants, and the distress therefore was illegal, as having been made more than six months after their term had expired. *Laing et al. v. Ontario Loan and Savings Co.*, 46 Q. B. 114.

The goods distrained were crops produced from the land after the 1st November, 1879, and the plaintiffs claimed them under a chattel mortgage, given on 31st May, 1880, of such crops, which had then been just sown:—Held, that the growing crop passed by the chattel mortgage to the plaintiffs, who were entitled to recover for them as against the defendants. *Id.*

The plaintiff mortgaged his land to the F. L. & S.'s Co. by a mortgage which contained a distress clause, and gave a second mortgage to the defendant, by which it was agreed between them that if default was made in payment of interest to the company the defendant should be at liberty to pay it, and should have the same remedies for its recovery from the mortgagor that the company had. Default having been made the company exercised their power of sale, and the defendant became the purchaser. After signing a contract for the purchase he distrained the goods of the plaintiff for the interest that had fallen in arrear to the company. Shortly afterwards he obtained a formal conveyance of the land, expressed to be under the power of sale in the company's mortgage:—Held, that the plaintiff's estate having paid the mortgage

debt to the company in full the defendant could not be said by means of his purchase thereof to have paid the interest in arrear so as to entitle him to distrain therefor. *Harron v. Yemen*, 3 O. R., Q. B. D. 126.

III. POWER OF DISTRESS FOR ANNUITY.

Effect of. See *Crone v. Crone*, 27 Chy. 425, p. 10.

V. DAMAGE FEASANT.

A municipal council by by-law, passed pursuant to the Municipal Act, enacted that certain descriptions of animals (naming them), and all four-footed animals known to be breachy, should not be allowed to run at large in the township; and provided for fixing the height of fences. The plaintiff's cattle strayed from the highway into the lands of defendant Williams, whose fences were not of the height required by the by-law. He distrained them and they were impounded, defendant Steeper being the pound-keeper. In an action of replevin:—Held, that as the by-law did not affirmatively authorize these cattle to run at large by negatively providing that certain other classes of animals should not be allowed to do so, the plaintiff was liable at common law, and under R. S. O. c. 195, for the damage done, irrespective of any question as to the height of the defendant's fences. *Croue v. Steeper et al.*, 46 Q. B. 87.

Defendant seized the plaintiff's oxen damage feasant in his wheat field, but being unable to find a pound-keeper, turned them loose near the plaintiff's gate. On the evening of the same day the defendant again seized them for doing damage to his meadow and impounded them, giving a statement of his claim for damage to the wheat, but making no claim for injury to the meadow:—Held, that the damage to the wheat had been abandoned, and that the impounding and sale of the oxen for the damage so claimed were illegal. The plaintiff forbade the sale, when defendant told the pound-keeper to sell and that he would be responsible:—Held, that the defendant and pound-keeper were both liable. *Spafford v. Hubbell*, M. T. 2 Vict., R. & J. Dig. Col. 1517, explained. *Buist v. McCombe et al.*, 8 A. R. 598.

DISTRIBUTION OF ESTATE.

I. STATUTE OF DISTRIBUTIONS, 213.

II. PARTITION OF ESTATE—See PARTITION.

III. ACCORDING TO TESTAMENTARY DISPOSITIONS—See WILL.

IV. ADMINISTRATION SUITS—See EXECUTORS AND ADMINISTRATORS.

V. PARTIES TO DISTRIBUTE—See EXECUTORS AND ADMINISTRATORS.

I. STATUTE OF DISTRIBUTIONS.

The proviso in the statute of distributions that "There be no representations admitted amongst collaterals after brothers and sisters children" excludes the children of a deceased nephew of the intestate. *Crowther et al. v. Cawthra et al.*, 1 O. R., Chy. D. 128.

DITCHES.

See WATER AND WATER COURSES.

Obligation of municipal corporations to fence. See *Walton et al. v. The Corporation of the County of York*, 6 A. R. 181.

DIVISION COURTS.

I. JURISDICTION.

1. *Where Actions must be Brought and Proceedings Carried on*, 214.
2. *Title to Land*, 214.
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XI. SECURITY FOR COSTS—See COSTS.

I. JURISDICTION.

1. *Where Actions must be Brought and Proceedings Carried on*.

The defendant who resided within the limits of the Tenth Division Court of the County of York drew a cheque in the plaintiff's favour within the limits of the First Division Court of the same county upon a bank situate in the Tenth division. The cheque having been dishonoured, the plaintiff sued upon it in the First Division Court:—Held, that the action was improperly brought there and that a summons for a prohibition thereto, on the ground of want of jurisdiction, must be made absolute. *Kiny v. Farrell*, 8 P. R. 119.—Osler.

The defendant residing at Port Elgin, by letter, instructed the plaintiff, an attorney at Toronto, to take certain legal proceedings. The plaintiff having performed these services brought the present suit in a Division Court at Toronto, to recover his fees:—Held, that the cause of action partly arose in each place, and that a prohibition should issue. *In re Hagle v. Dalrymple*, 8 P. R. 183.—Hagarty.

2. Title to Land.

In an action in a Division Court to recover \$79.50 for taxes on certain land, which defendant was to pay as rent therefor, the facts as to the terms and conditions of the tenancy were disputed, but the defendant did not dispute the plaintiff's title. On the plaintiff obtaining judg-

ment for the amount claimed, the defendant applied for a prohibition, on the ground that the title to land was brought in question :—Held, that the amount was properly recoverable in a Division Court. *In re English v. Mulholland*, 9 P. R. 145.—Cameron.

3. On Accounts.

Where the original demand, no matter how large, is ascertained by the signature of the party liable, and a balance not exceeding \$200 remains due, the Division Courts under the Act of 1880 have jurisdiction. *Bank of Ottawa v. McLaughlin*, 8 A. R. 543.

4. Actions on Notes.

The plaintiff sued the defendant in the Division Court for \$100, and endorsed on the summons as particulars a promissory note for \$125 :—Held, that the plaintiff might at the trial abandon in his particulars the excess above \$100, so as to bring the case within Division Court jurisdiction. *In re Stogdale and Wilson*, 8 P. R. 5.—Hagarty.

Plaintiff sued on a promissory note for \$73.14, payable with interest at 7 per cent ; the principal and interest together amounting to \$103.44 :—Held, that under the Division Courts Act, 1880, the amount of fixed legal damages in the nature of interest for non-payment of a promissory note need not be under the signature of defendant, and the above claim could therefore be recovered in a Division Court. *McCracken v. Creswick*, 8 P. R. 501.—Hagarty.

Plaintiff having paid a note of which he and defendant were joint makers, for \$169, but which the plaintiff signed as a surety only : Held, that plaintiff could not sue defendant in a Division Court for the money so paid, the amount not being ascertained by the signature of defendant. A summons for prohibition was made absolute without costs, there being no meritorious defence. *Kinsey v. Roche*, 8 P. R. 515.—Osler.

The plaintiff sued on a promissory note for \$158, payable with interest at ten per cent., the principal and interest amounting to \$185.65 :—Held, following *McCracken v. Creswick*, 8 P. R. 501, that under the Division Courts Act, 1880, 43 Vict. c. 8, O., the above claim could be recovered in the Division Court. *In re Widmeyer et al. v. McMahon et al.*, 32 C. P. 187.

In an action in a Division Court against a married woman on a promissory note, the existence of separate real estate was proved, but no evidence was given of any separate personal estate. Judgment was rendered for plaintiff, the amount thereof to be paid out of the separate property she had when the note was made. *Ib.*

The Division Courts Act, 1880, does not apply to the Division Courts in Territorial Divisions, and Unorganized Tracts, and a prohibition was ordered to restrain a stipendiary magistrate from adjudicating upon a claim on a promissory note for \$110. *In re The Ontario Bank v. Harston*, 9 P. R. 47.—Osler.

See *In re Drinkwater v. Clarridge*, 8 P. R. 504, p. 219

5. Other Cases.

On an application for a prohibition to a Division Court after judgment and execution, where the question of jurisdiction depends upon disputed facts—as in this case, upon whether the person by whom the bargain sued upon was made, acted as plaintiff's or defendant's agent—if the Division Court Judge has decided this question on evidence, and found in favour of his jurisdiction, the Court will not interfere with his finding ; but here, there having been no such decision, and the want of jurisdiction being clear upon the affidavits filed, a prohibition was granted. *Stephens v. Laplante*, 8 P. R. 52.—Hagarty.

The process of Division Courts is of no effect outside the Province of Ontario. *Ontario Glass Company v. Swartz*, 9 P. R. 252.—Cameron.

The plaintiff sued in the Division Court on a claim which was originally composed of a solicitor's bill of costs, \$36.06 ; damages, \$69.33 ; due for advice, \$6 ; total \$111.39. The plaintiff abandoned as to \$11.39, without specifying from what items he threw the amount off. The plaintiff, at the trial, agreed to take \$30 for the first item, and the learned Judge reduced the \$69.33 to \$62, the \$6 item was struck out, and the total then stood \$92.33. This sum was further reduced to \$80, for which judgment was entered :—Held, affirming the judgment of Wilson, C. J., that prohibition was properly directed ; that the abandonment being general, it could not be assumed that the plaintiff had made a reduction in his demand for damages, so as to give the Court jurisdiction ; and even if the Court had power to confine the prohibition to the claim for damages, it could not be done here, for it did not appear how much of the \$80 was applicable to such claim. *Meek v. Scobell*, 4 O. R., C. P. D. 553.

The nature of the claim, as appearing on the summons, is the claim recognizable on a motion for prohibition. *Ib.*

By the Division Courts Act, 1880, these Courts have jurisdiction in actions for a debt, the amount or balance of which does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant. Where the claim was upon the following document : " Received from R. W., an order from C. B., ordering me to pay him the sum of \$140, which is accepted on the following conditions, providing he carries out his agreement with me as cheese-maker." Signed by the defendant :—Held, that the Division Court had no jurisdiction, because the writing did not ascertain the amount, inasmuch as it depended upon the happening of certain events with respect to which evidence had to be adduced. *Willsie v. Ward*, 8 A. R. 549.

See *Re Mead v. Creary*, 32 C. P. 1, p. 217 ; *Re Burdett a Solicitor*, 9 P. R. 487 p. 44.

II. EXECUTION.

Per Osler, J. A married woman's separate personal estate, but not her real estate, may be charged and sold under a judgment against her in the Division Court. The omission to prove the existence of such separate personal estate, though it may be urged as a defence, does not

affect the jurisdiction. Prohibition was therefore refused. *In re Widmeyer v. McMahon*, 32 C. P. 187.

Held, that the terms "fieri facias" and "warrant of execution," used in the Division Courts Act, are convertible terms. *Macfie v. Hunter*, 9 P. R. 149.—Cameron.

III. INTERPLEADER.

There is no right of appeal from the decision of the Judge in an interpleader suit in a Division Court, even when the amount in dispute exceeds \$100. *In Re Turner v. Imperial Bank of Canada*, 9 P. R. 19.—Osler.

Held, that the term "execution creditors," used in sec. 11 of the Interpleader Act, taken in connection with sec. 12, includes parties holding executions in Division Courts, who are therefore proper parties to, and should be called upon in an interpleader application by a sheriff. *Macfie v. Hunter*, 9 P. R. 149.—Cameron.

The plaintiff, a Division Court bailiff, having seized a quantity of wheat under a warrant of execution against one P. which the defendant claimed, an interpleader summons issued, and on its return was adjourned with leave to the defendant to file his claim in fifteen days. Afterwards the case came up for final hearing, when the Judge made this order, "the claimant not having put in his claim or complied with the order above made is barred, and is ordered to pay the costs in fifteen days." The plaintiff, as such bailiff, thereupon brought this action to recover the wheat, which the defendant had obtained possession of pending the summons:—Held, on appeal, affirming the decision of the County Court Judge, that the minute so made by the judge in the interpleader issue was equivalent to stating that the claim was dismissed, and was final and conclusive upon the defendant, and that he could not be heard to say that the bailiff had not seized the wheat. *Hunter v. Vanstone*, 7 A. R. 750.

IV. ATTACHMENT OF DEBTS.

A plaintiff in a Division Court, proceeding against a primary debtor and a garnishee in a Court which would not have jurisdiction against the primary debtor alone, must prove a garnishable debt in the hands of the garnishee; otherwise, a prohibition will lie. *In re Holland v. Wallace et al.*, 8 P. R. 186.—Hagarty.

A garnishee is not a defendant within the meaning of the R. S. O. c. 47, s. 62. *Ib.*

Held, reversing the judgment of Cameron, J., 8 P. R. 374, that a primary creditor can garnish part of a debt due by a third person to the primary debtor for which, as between the primary debtor and the garnishee, a suit could not be maintained in the Division Court by reason of the amount being in excess of the jurisdiction. *Re Mead v. Creary*, 32 C. P. 1.

Held, also, affirming the judgment of Cameron, J., that the notice mentioned in s. 14 of 43 Vict. c. 8, Ont., refers only to suits otherwise of the proper competence of the Division Court, but which have been brought in the wrong division. *Ib.*

Semble, that money paid to a Division Court clerk for a suitor in a cause is paid in to the use of the suitor, and is garnishable. *Bland et al. v. Andrews et al.*, 45 Q. B. 431. Per Cameron, J. It does not become a debt from the Division Court clerk to the suitor till demand made, and so is not garnishable until then. *Ib.*

Where the garnishee, who was clerk of the First Division Court of the county of York, had submitted himself to the jurisdiction, and had paid the money in his hands into the Tenth Division Court of the County, from which latter court the summons issued, and the judge of the Division Court had acted within his jurisdiction in determining whether the garnishee was indebted to the primary creditor and whether the debt was attachable:—Held, that the order of Galt, J., discharging a summons for a prohibition was right; and a rule nisi to rescind the same, and for a writ of prohibition, was discharged. *Dolphin v. Layton*, L. R. 4 C. P. D. 130, remarked upon. *Ib.*

Held, affirming the judgment of Armour, J., that where a garnishee does not file a notice disputing the jurisdiction of a Division Court within the time required by 43 Vict. c. 8, s. 14, O., though no objection can be taken to this jurisdiction of the Division Court in that court, the jurisdiction of the High Court of Justice to prohibit the proceedings is not ousted. The garnishees, though partners, resided in different places out of the jurisdiction of the Division Court, and but one of them was served. No order was made dispensing with service on the other. The learned Division Court judge gave judgment against both in their absence. Per Armour, J. The prohibition might be supported on this ground also. R. S. O. c. 47, s. 134 construed. The Judicature Act does not apply to a case of this kind, the proceedings of which are specially provided for in the Division Courts Act. *Clarke v. Macdonald*, 4 O. R., Q. B. D. 310.

V. PRACTICE.

A witness in a Division Court suit having admitted that he was the real debtor, the plaintiff was allowed, under D. C. Rule 115 to substitute the witness as a defendant and obtain a judgment against him:—Held, on an application for a prohibition, that the Division Court Judge had the power to do this. *In re Henney et al. v. Scott*, 8 P. R. 251.—Galt.

The plaintiff residing within the limits of the Ninth Division Court of Wentworth, sued, in that Court two defendants, who both resided in St. Catharines, on a cause of action which partly arose in St. Catharines. One defendant put in a notice of defence disputing the claim and the jurisdiction of the Court. At the trial neither defendant appeared, and the Division Court Judge gave judgment for the plaintiff without requiring any proof of the claim, in accordance, it was said, with the practice in that county:—Held, that proof of the claim should have been given, and a prohibition was ordered with costs: Held, also, that an application for a new trial by the defendant who had given the notice was no waiver of his right to object to the jurisdiction; and that the other defendant could not prejudice

such right by having given no notice of defence. *In re Evans v. Sutton et al*, 8 P. R. 367.—Cameron.

In a suit in a Division Court upon a negotiable instrument, where the summons is specially endorsed, and defendant does not dispute the claim, the plaintiff is entitled to enter judgment for the amount claimed, without the production or filing of such instrument. *In re Drinkwater v. Claridge*, 8 P. R. 504.—Hagarty.

After judgment in an action in a Division Court of the County of Victoria, the defendant within the fourteen days required by the Division Courts Act, R. S. O., c. 47, s. 107, moved, on notice filed with the Clerk of the Court, for a new trial on the ground of the discovery of fresh evidence, but did not within the fourteen days file an affidavit as required by the Division Court Rule 142. An affidavit was subsequently filed, the motion heard, and a new trial granted by the County Court Judge. A motion for prohibition was refused, the transgression of a Rule of practice forming no ground for such motion. *Fee v. McIlhargey*, 9 P. R. 329.—Osler.

The Judicature Act and rules in relation to procedure do not apply to the Division Courts; and rule 330 of the Supreme Court of Judicature applies only to the courts to which in terms it is made applicable. *Bank of Ottawa v. McLaughlin*, 8 A.R. 543.

See *Re Mead v. Creary*, 32 C. P. 1, p. 217; *Clarke v. Macdonald*, 4 O. R. 310, p. 218.

VI. APPEAL FROM.

No case exists for prohibition to a Division Court, pending an appeal from that Court to the Court of Appeal, under 43 Vict. c. 8, O. *Wiltsey v. Ward*, 9 P. R. 216.—Cameron.

At the trial the plaintiff elected to take a nonsuit, and the judge refused a new trial:—Held, that plaintiff was entitled to move to set aside the nonsuit, and if refused could appeal therefrom. *Bank of Ottawa v. McLaughlin*, 8 A. R. 543.

See *re Turner v. Imperial Bank of Canada*, 9 P. R. 19, p. 217.

VII. JUDGE.

Under the authority of the following deputation: "Belleville, Ont., 24th July, 1880. I hereby appoint E. B. Fralick, Esq., barrister-at-law, as my deputy to hold the Second Division Court of the County of Hastings, on Monday, the 26th day of July, instant, at the Town Hall, in the Township of Sidney. T. A. Lazier, junior judge, C. H." The person therein named tried this case at the time and place appointed, but delivered his judgment, according to a postponement for that purpose, on 2nd August following, at the judge's chambers in Belleville, outside the limits of the second division, but within the county, without having named a day and hour for delivery thereof in writing at the clerk's office:—Held, (1) That the word "judge" in s. 20 of R. S. O., c. 47, includes the junior judge, and that the deputation was therefore valid. (2) That the proper construction of the same was, "to hold the Sec-

ond Division Court of the County of Hastings, to be holden on Monday," &c., and that his appointment continued until he had performed the purpose for which it was made. (3) That the effect was to clothe Mr. Fralick with all the powers of the junior judge during the time of his appointment, wherever he might be within the county. And the rule was therefore made absolute to rescind the order made by Galt, J., for a prohibition. Cameron, J., dissenting. *In Re Leibes v. Ward*, 45 Q. B. 375.

As to right of Provincial Government to appoint a Division Court Judge. See *In re Wilson v. McGuire*, 2 O. R. 118, p. 117.

VIII. CLERK AND HIS SURETIES.

Effect of special arrangement made with Clerk as to fees. See *Victoria Mutual Fire Insurance Co. v Davidson*, et al, 3 O. R. 378.

IX. BAILIFFS.

Observations on the impropriety of Division Court Bailiffs canvassing voters during an election. *North Victoria Election — Cameron v. Maclellan*, 1 H. E. C. 612.—Morrison.

Notice of action to Bailiff. See *Hanns v. Johnston*, 3 O. R. 100, pp. 4, 5.

X. DIVISION COURT BONDS.

All Division Court bonds made before 1st July, 1869, are effectually released by 36 Vict. c. 6, s. 5, Ont., as to liabilities incurred thereunder both before and since that date. *Re Franklin*, 8 P. R. 470.—Blake.

DIVISIONAL COURT.

I. APPEALS TO, 220.

II. APPEALS FROM, 221.

I. APPEALS TO.

Where a judge in single Court had, before the Judicature Act, decided applications to quash a by-law and to set-off judgments:—Held, that under the Act there could be no appeal to a Divisional Court. *In re Galerno and the Corporation of the Township of Rochester and Grant v. McAlpine*, 46 Q. B. 379.

A Divisional Court has no jurisdiction to entertain an appeal from an order of a judge, made in court on motion, except by consent. *Re Galerno*, 46 Q. B. 379, followed. *McTiernan v. Frazer*, 9 P. R. 246.—Boyd. Ferguson.

Rules 274 and 317, O. J. Act, restrict the jurisdiction of the Divisional Court after judgment to cases in which the findings of fact have been undisputed, and in which it is only sought to modify or set aside the conclusion drawn by the judges therefrom; but if the appeal is on the whole case, as to both facts and law, it must be to the Court of Appeal. *Trude v. Phoenix Ins. Co.*, 29 Chy. 426.

Although the decree was pronounced before the Judicature Act, and might have been reheard under the former practice, yet the cause not having been set down to be reheard before the coming into force of the Act, it could not under the provisions of the Act respecting pending business, be reheard. *Ib.*

Held, that a Divisional Court may review the action of a judge in setting aside a writ of ca. sa. and the arrest thereunder, and also his action in making the order to arrest. *Cartwright v. Hinds*, 3 O. R., C. P. D. 384.

Held, that appeals from the Master in Chambers are governed by rule 427, and not by rule 414, O. J. Act, which applies to appeals to a Divisional Court. *Lowson v. The Canada Farmer's Ins. Co.*, 9 P. R. 185.—Boyd.

As to time for appealing under O. J. Act, Rule 414. See *Hewson v. Macdonald*, 32 C. P. 407.

As to separate appeals to Court of Appeal and Divisional Court. See *Hately et al. v. Merchants Despatch Co. et al.*, 4 O. R. 723, p. 180.

See *Cochrane v. Boucher*, 8 A. R. 555, *infra*.

II. APPEALS FROM.

Where there has been a trial by jury in an interpleader issue directed from the Chancery Division, an application for a new trial must be made to the Divisional Court, and not to a single judge. *Cole v. Campbell*, 9 P. R. 498.—Boyd.

An action having been tried before a judge with a jury, the judgment was directed to be entered by the judge upon the answers to questions put by him to the jury, and the damages were assessed by the jury. The defendants subsequently moved before the three judges of the Divisional Court to set aside the judgment directed to be entered, but the Divisional Court, when giving judgment upon the motion, consisted of two judges only, one of them being the judge at the trial:—Held, that a court so constituted had by reason of s. 29, sub-s. 5 of the Judicature Act, no power to give judgment, and there being therefore nothing to appeal from, leave to appeal was refused. *Cochrane v. Boucher*, 8 A. R. 555.

DOMINION PARLIAMENT.

I. POWERS OF—See CONSTITUTIONAL LAW.

II. ELECTIONS TO—See PARLIAMENT.

DIVORCE.

Foreign Divorce—Effect of on claim for alimony. See *Guest v. Guest*, 3 O. R. 344; *Magurn v. Magurn*, 3 O. R. 570.

DOMICILE.

See *Jones v. Canada Central R. W. Co.*, 46 Q. B. 250, p. 116. See also *Guest v. Guest*, 3 O. R. 344; *Cartwright v. Hinds*, 3 O. R. 384; *Magurn v. Magurn*, 3 O. R. 570.

DOUBLE VALUE.

See DISTRESS.

DOWER.

I. RIGHT TO.

1. *Mortgaged Property*, 222.

2. *Other Cases*, 223.

II. FORFEITURE OF DOWER BY ACCEPTANCE OF DEVISE OR BEQUEST, 223.

III. ACTIONS AND PROCEEDINGS FOR.

1. *Pleading*, 225.

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IV. DAMAGES, 227.

V. RIGHTS OF PURCHASERS WHERE THERE IS OUTSTANDING DOWER, 227.

VI. MISCELLANEOUS CASES, 228.

I. RIGHT TO.

1. *Mortgaged Property*.

H. being possessed of some lands executed mortgages of them, some of which were given to secure unpaid purchase money, and others to secure the repayment of money lent to H. The wife of the mortgagor had joined in the mortgages to bar dower. H. having died intestate:—Held, on sale of the lands under decree, directing a sum in gross, in lieu of dower, to be paid to the widow, that she was entitled to dower out of the whole amount realized from the sale, after deducting therefrom the amount of the mortgages given by H. to secure unpaid purchase money, but not of the other mortgages. *Re Hopkins; Barnes v. Hopkins*, 8 P. R. 160.—Blake.

The widow of a mortgagor, the defendant in a mortgage suit, did not prove her claim for dower on the reference before the Master, as it was not then certain that the rights of the mortgagee would be fully protected, and she was not found an incumbrancer by the report. By consent of all parties a sale was had, and the purchaser paid ten per cent. of the purchase money down, but subsequently applied for and obtained from the Referee an order dispensing with the payment of the purchase money into Court, and vesting the estate in the purchaser. The widow opposed the granting of this order, claiming to be allowed in to prove her claim for dower, but without avail. On appeal, Proudfoot, V.C., allowed the appeal, and reversed the Referee's order, but without costs, as the dilatory conduct of the widow had invited discussion. *Hyde v. Barton*, 8 P. R. 205.—Taylor, Referee.—Proudfoot.

The defendant, a judgment debtor being the owner of lands subject to mortgages in which his wife had joined, sold the same, and allowed her to receive a part of the purchase money for her dower. On an application for a ca sa:—Held, that she was not entitled to anything for dower, and that the 42 Vict., c. 22, s. 2, O., does not apply to a case of voluntary sale by a husband. *Calvert v. Black*, 8 P. R. 255.—Galt.

See *Reid v. Reid*, 29 Chy. 372, p. 223.

2. Other Cases.

The general rule as between a tenant for life and the remainderman in respect of a charge upon an estate, is, that the tenant for life must keep down the interest on such charge, and the duty of the remainderman is to pay the principal. This rule was applied where a widow claimed to have dower out of her husband's estate, which at the time of her marriage was subject to certain legacies and a mortgage, in preference to an annuity given her by his will; she being held bound to pay one-third of the interest on these claims until they became payable, after which the remainderman must pay all the interest as well as the principal thereof. *Reid v. Reid*, 29 Chy. 372.

When a husband died entitled to the reversion in fee in certain lands expectant on a life estate therein:—Held, that dower could not be claimed therein, for that the husband had never been seized during coverture of an estate of inheritance in possession. *Leitch v. McLellan*, 2 O. R., C. P. D. 587.

See also *Pyatt v. McKee et al*, 3 O. R. 151.

II. FORFEITURE OF DOWER BY ACCEPTANCE OF DEVISE OR BEQUEST.

A testator devised and bequeathed to his wife, during widowhood, all his household goods, furniture, &c., together with an annuity of twenty dollars, and also the free use, during the same time, of the homestead lot, together with the several dwellings and other buildings thereon. Two parcels of his real estate he devised to his two sons, upon which he placed certain fixed valuations—found by the Master to be the full values—and directed one of the sons to pay three fifths of the interest computed on the valuation of his lot to the three daughters of the testator for life, the other son to pay interest on the valuation of his lot to the executors during the life or widowhood of his mother. The homestead and the other portions of his real, as also his personal estate, the testator directed to be sold and the proceeds divided at the death or marriage of the widow.—Held, that she was not forced to elect, and that the direction to sell the lands was not sufficient to put her to her election. *Beilstein v. Beilstein*, 27 Chy. 41.

The testator by his will, executed in 1840, gave the annual income of all his real estate to his wife, for the support of herself and children during widowhood; and after her death or marriage, and the youngest child attaining majority, the property was to be divided. He appointed his widow and eldest son executrix and executor, both of whom continued to reside, with the other members of the family, in the homestead, and she, with the consent of her son, received the rents of the realty, which she applied in the support of the children for more than twenty years after the death of the testator, without having had dower assigned to her, or having made any demand therefor. Some of the lands had been acquired by the testator after the execution of the will, and as to them there was an intestacy. A bill having been filed by one of the heirs, seeking an account of rents received by the widow, and a partition of descended lands.—Held, on rehearing (in this affirming the order of Proudfoot,

V. C., 25 Chy. 293,) that the widow was not bound to elect between the provision made for her by the will and her dower, and that notwithstanding the lapse of time she was entitled, out of the devised land to retain one-third of the rents in respect of past and future dower; but that, as to the descended lands, the remedy was barred by the Statute of Limitations; that the claim made by the widow in her answer, and awarded her by the decree, was a pursuing the remedy so as to bring the case within the statute, although as to the rents of these lands received, the widow was entitled to set off against the claim made by the plaintiff, the amount which she was entitled to have received thereout as dowress. (Proudfoot, V. C., dissenting, who considered the widow entitled to the same relief in respect of these as of the lands devised.) *Laidlaw v. Jackson*, 27 Chy. 101.

The testator bequeathed to his widow for life an annuity of \$60, payable by his son J., his heirs, &c., together with all and singular his household furniture, &c., and in the event of his widow remaining in the dwelling-house on the premises after his decease, she was to have the free use of certain rooms therein; and in case of sickness while there this son was to see that she had proper medical attendance and nursing. This annuity as well as the other bequests the testator charged upon the lands in question, and devised the same so burthened to his said son, the defendant. The widow filed her bill for payment of the annuity alone, not claiming any lien on the land in respect of the charges created in her favour by the will or for dower. The usual decree for payment or in default sale was made, with reference to the Master at Hamilton, under which the land was sold, without any reference to dower or the other charges, and the purchase money was paid into Court. In the Master's office the widow made no claim, either for dower or in respect of the other charges; but she afterwards presented a petition to have it declared that she was entitled to dower in the land and to compensation in respect of the bequests above set out, and prayed that a sum in gross out of the money in Court should be paid to her in lieu of dower, and a proper sum allowed by way of compensation for the other benefits.—Held, following *Murphy v. Murphy*, 25 Chy. 81, that the widow was not put to her election by the will, and that she was entitled to have a proper sum paid to her for dower out of the purchase money in Court; but that by her acquiescing in the sale of the land, and by her laches, she had waived her right to any compensation for the loss of the benefits bequeathed to her. *Ripley v. Ripley*, 28 Chy. 610.

A testator devised to his widow his "house and orchard for a home for herself and children as long as she may live," and to his son Duncan all his title and interest in the farm lot, and all implements thereon, "at the death of my wife as aforesaid, on condition that he shall provide for her board and maintenance, he, my son Duncan, holding possession of the land from the time of my decease, subject to the proviso aforesaid."—Held, That the widow was put to her election between her dower and the provision made for her by the will; the latter forming a charge upon the lands devised. *McLellan v. McLellan*, 29 Chy. 1.

A testator devised all his real and personal estate, to trustees to sell the realty and get in the personalty, the proceeds of which, after payment of debts, they were to invest in their names upon trust to pay the annual income to his two sons in equal moieties, they maintaining their mother during life; and after the death of each of the sons the trustees to hold one moiety of the trust moneys upon trust to pay and divide and transfer the same equally between and amongst such of his children as should be living at his decease, and the issue then living of such children as should be then dead, as tenants in common in a course of distribution, according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take, by way of substitution, amongst them, the share or respective shares only, which the deceased parent or parents would, if living, have taken:—Held, that the widow was not put to her election, but was entitled to dower as well as the provision made for her by the will: and it being alleged that the sons had not provided for her maintenance, a declaration was made that she was entitled to such maintenance, and a reference was directed to find what would be a proper sum for that purpose. *McGarry v. Thompson*, 29 Chy. 287.

A testator, amongst other things, made certain bequests in favour of his widow, and directed that his farm, the only real estate he possessed, should be leased to two of his three brothers named as executors until such time as his nephew and son attained twenty-one:—Held, that, under these circumstances, the widow was bound to elect between her dower and the benefits given by the will. *Rody v. Rody*, 29 Chy. 324.

The testator made a provision in favour of his widow, much more advantageous to her than her interest as dowress, and which was expressly given in lieu of dower, and given during widowhood. The will was acted upon for two years, when the widow married a brother of her deceased husband, and thereupon filed a bill alleging that she had accepted the provisions and bequests made for and given to her by the will in ignorance of her right to dower, had she elected to take dower; and in her evidence she swore that she had been ignorant of such right until advised in respect thereof in 1880, shortly before her second marriage, and she now sought to have dower assigned to her:—Held, that the rule "*Ignorantia juris neminem excusat*" applied, and the bill was dismissed, with costs. *Gillam v. Gillam*, 29 Chy. 376.

III. ACTIONS AND PROCEEDINGS FOR.

1. Pleading.

To a summons under "The Dower Procedure Act," R. S. O. c. 55, with the statutory notice endorsed under s. 10, claiming damages, the defendant entered an appearance under s. 20, with an acknowledgment that he was tenant of the freehold, and consent that plaintiff might have judgment for her dower, and take the necessary proceedings to have the same assigned to her. The plaintiff then served a declaration claiming dower as well as damages for its detention:—Held, that the declaration was bad, and must be set aside, in claiming dower when her right to it was admitted. *Quære*, whether such damages

might not be recovered on a record properly framed. *Linfoot v. Duncombe*, 21 C. P. 484, remarked upon. *Harvey v. Pearsall*, 31 C. P. 239.

In a bill seeking to obtain the benefit of a sale of land freed from the dower of the widow of the deceased owner, it was alleged that he had died at such a time as would, if true, bar the widow's right to dower, and submitted "that the defendant E. B. (the widow) is not entitled to dower:—Held, a sufficient allegation that the defendant's right to dower was barred by the statute, though it omitted to state that this was the legal result of any particular statute. *Banks v. Bellamy*, 27 Chy. 342.

See *Ryan v. Fish*, 4 O. R. 335, p. 227.

2. Other Cases.

A plaintiff in an action for dower recovered judgment, but before the execution of the writ of assignment of dower, and after its issue, the tenant of the freehold died, having devised the land in question to the present defendant:—Held, that the plaintiff must proceed against the devisee by scire facias, and not by suggestion or revivor. *Davis v. Dennison*, 8 P. R. 7.—Hagarty.

The widow and heir joined in creating a term in the descended lands for ten years, and in the lease it was stated that it had been mutually agreed between the parties thereto that one-third of the rent should be paid to the widow in each year, which was accordingly done during the currency of the term:—Held, that this had the effect of preventing the lapse of time being set up as a bar under the statute to the widow's right to dower. *Fraser v. Gunn*, 27 Chy. 63.

The demandant, who was a stranger to the life estate, was held not entitled to set up that there had been a forfeiture thereof by non-payment of rent or other breach of covenant. *Leitch v. McLellan*, 2 O. R., C. P. D. 587.—Osler—Affirmed in full court.

Held, that the presumption of death arising from continued absence of the demandant's husband, unheard of for seven years, is sufficient to sustain an action of dower as against the objection that he is still living. *Giles v. Morrow*, 1 O. R., Q. B. D. 527.

The report in an action of dower was filed on 29th May, during the Easter Sittings of the court. A motion was made against it within the first four days of the Michaelmas Sittings:—Held, that the motion was too late, for it should have been made to a vacation judge under Rules 482 and 483. *Giles v. Morrow*, 4 O. R., Q. B. D. 649.

In an action for dower and damages for detention of dower, defendants appeared under R. S. O. c. 55, s. 20, and filed acknowledgment of tenancy, consent to dower, &c. Plaintiff's solicitor thereupon entered judgment of seisin, issued writ of assignment of dower, and proceeded for damages. The judgment of seisin was held at the hearing to be final, and to preclude any proceeding for damages, but leave was given to plaintiff to move in Chambers to vacate it. The master in Chambers made an order vacating the judgment:—Held, on appeal, that the order was

one in the discretion of the master, which was properly exercised under the circumstances in the plaintiff's favour, especially as judgment had been signed through mistake of her solicitor. *Ryan v. Fish et al.*, 9 P. R. 458.—Proudfoot.

IV. DAMAGES.

Quære, whether damages for detention of dower, or for arrears of dower, can be recovered under the Dower Act. *Giles v. Morrow*, 1 O. R., Q. B. D. 527.

R. brought an action for dower against F., the tenant of the freehold, who claimed title through the devise of her husband, and endorsed her writ with a claim for damages for detention of dower. F. appeared and admitted his tenancy, and R.'s right to dower:—Held, that R. might, nevertheless, go on and recover damages for the detention from and after demand for dower made by her on F. *Ryan v. Fish et al.*, 4 O. R., Chy. D. 335.

Held, also, that R. S. O. c. 55, has not taken away or diminished the right of a dower to damages as well for mesne profits, as for detention, against all persons and in all cases where they were recoverable before August 10th, 1850. *Ib.*

Held, further, that, at all events, since the O. J. Act, s. 17, sub-s. 10, a tenant of the freehold claiming, as in this case, may plead that he has at all times, since he became such tenant, been ready and willing to render the plaintiff her dower, and if the plaintiff desires to avoid that plea she should reply a demand and refusal. *Ib.*

Quære, whether if such demand and refusal be pleaded and proved, damages can be computed against such a tenant from the death of the husband or only from the date of the plaintiff's demand for dower. *Ib.*

See *Harvey v. Pearsall*, 31 C. P. 239, p. 226; *Ryan v. Fish et al.*, 9 P. R. 458, *supra*.

V. RIGHTS OF PURCHASERS WHERE THERE IS OUTSTANDING DOWER.

At a sale under a decree on the 25th March, 1879, A. purchased the land in question. On the 19th April, 1879, he transferred his interest to W., and on the 26th April, one H. purchased and took an assignment of the dower of one S. in the land. On the 16th February, 1880, A. applied to be relieved from the contract to purchase on the ground of the outstanding dower. The evidence shewed that S. had agreed with the heir-at-law to accept a gross sum in lieu of her dower, that W. really purchased the dower, but took the assignment in H.'s name, and that this application though in A.'s name, was really made by W.:—Held, that no relief could be granted, the applicant having himself created the obstacle by means of which he sought to prevent the sale being carried out. *Fraser v. Gunn*, 8 P. R. 278.—Spragge.

An owner of real estate who alone enters into an agreement to sell will be required to procure a bar of his wife's dower or abate the purchase money in the event of her refusal. *VanNorman v. Beaupre*, 5 Chy. 599. *Loughead v. Stubbs*, 27 Chy. 387.

On a sale of land by an infant under R. S. O. c. 40, ss. 75-83, an order was made under 44 Vict. c. 14, s. 5, Ont., barring the dower of the infant's mother who was a lunatic and confined in an asylum. *Re Colthart*, 9 P. R. 356.—Ferguson.

VI. MISCELLANEOUS CASES.

In ejectment the defendant was allowed to set up a counter claim for dower out of the lands in question. Remarks as to the form of decree in such a case. *Glass v. Glass*, 9 P. R. 14.—Osler.

Held, that the statute 42 Vict. c. 22, O., "An Act to amend the law of dower," does not apply to mortgages made before it was passed. *Martindale v. Clarkson*, 6 A. R. 1.

See *Re Morse*, 8 P. R. 475, p. 321; *Lavin v. Lavin*, 2 O. R. 187. p. 326.

DRAINS AND DRAINAGE.

See MUNICIPAL CORPORATIONS—WATER AND WATER COURSES.

EASEMENT.

- I. RIGHT TO BY PRESCRIPTION—See LIMITATION OF ACTIONS AND SUITS.
- II. LATERAL SUPPORT—See LATERAL SUPPORT.
- III. LIGHTS.—See LIGHT.
- IV. RIGHT OF WAY.—See WAY.

As to the right of a grantee of land on the bank of a river where free access to the public is reserved to complain of injury caused by the penning back of the water of the river by a mill owner. See *Hawkins v. Mahaffy*, 29 Chy. 326.

See *Ross v. Hunter*, 7 S. C. R. 289, p. 702.

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EJECTMENT.

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V. REFERENCE TO DETERMINE ALLOWANCE FOR IMPROVEMENTS—See IMPROVEMENTS ON LAND.

I. PLAINTIFF'S TITLE.

The plaintiff was assignee in insolvency of H., who bought from the purchaser at the sheriff's sale. H. leased to T. and put him in possession, and had some small buildings put on the land. Subsequently, the defendant O. made untrue representations to T., which induced him to quit possession, whereupon O. went in and occupied, claiming under defendant W., who, he alleged, had an interest in the land. W. by his answer adopted O.'s possession and claimed under conveyance from the Crown, but failed to prove his title:—Held, following *Doe Johnson v. Baytup*, 3 A. & E. 188, that the possession so fraudulently obtained by O. did not entitle him to put the plaintiff upon proof of his title. *Nelles v. White*, 29 Chy. 338. Affirmed by Supreme Court 23rd June, 1884.

Where land had been taken by the Great Western R. W. Co. for the purposes of their railway under 9 Vict. c. 31, s. 30, and 16 Vict. c. 99, the company in ejectment brought by them can rely on the title acquired thereby, and are not driven to prove strictly the title of their grantors. *Great Western R. W. Co. v. Lutz*, 32 C. P. 166.

The defendant leased to his father the lands in question in this action for life, to work and enjoy the same, but that should the father in his later years become incapable of taking charge of the place as it should be by good husbandry, then and in such case the defendant was to be at liberty to govern the lands as seemed best to him. And in the event of the father becoming incapable of manual labour he was to be supported by the son, and it was agreed that, subject to the son's rights, the father was entitled to peaceable and quiet possession. The father became incapable of taking proper care of the place, and in consequence the defendant re-entered and worked the farm. Subsequently thereto the interest of the father was sold by the sheriff to the plaintiff, who brought ejectment. The jury having found the facts as above stated:—Held, (reversing the judgment of the court below, 31 C. P. 417.) that the defendant had, according to the terms of the lease, the right to possession, and that the plaintiff must therefore fail in his action. *Turley v. Benedict et al.*, 7 A. R. 300.

See *Greenshields v. Bradford*, 28 Chy. 299, p. 428.

II. BY AND AGAINST PARTICULAR PERSONS.

1. Mortgagees.

A mortgagee proceeded in ejectment against a mortgagor, and afterwards filed a bill in Chancery against him for a sale:—Held, that as the mortgagee could, since the Administration of Justice Act, R. S. O. c. 49, obtain in the Chancery suit all the remedies he could obtain in the ejectment suit, the latter should be stayed forever. *Hay v. McArthur*, 8 P. R. 321.

See *In re Flint and Jellet*, 8 P. R. 361, p. 41; *Western Canada Loan and Savings Co. v. Dunn*, 9 P. R. 587, p. 230.

2. Infants.

In an action of ejectment by mortgagees, on the application of the infant defendants, an order for immediate possession and sale of the mortgaged premises was made, with a reference to the master to take the usual accounts; but \$80 was ordered to be paid into court to meet the expenses of the sale. *Western Canada Loan and Savings Co. v. Dunn*, 9 P. R. 587, reversing *S. C. Ib. 490.*—Armour.

III. PRACTICE AND PROCEDURE.

1. Writ of Summons.

(a) Issue of Writ.

A writ in ejectment for the recovery of the possession of land may issue out of the proper office in any county, without reference to the locality of the land. *Canada Permanent Loan and Savings Co. v. Foley*, 9 P. R. 273.—Dalton, Master.

(b) Service.

The writ of summons in ejectment was served upon defendant's wife after he had left the country. An order to sign judgment against the husband was granted in default of appearance. *Trust and Loan Company v. Jones*, 8 P. R. 65.—Dalton, Q. C.

2. Adding and Striking out Parties.

An application by defendants in an action of ejectment to have their names struck out on the ground that they were not in possession at or subsequent to the issue of the writ, and disclaim any interest in the land, is regularly made before appearance, although the application would be entertained after appearance where the justice of the case required it. But where two defendants applied after appearance to have their names struck out, and the court, from the facts, entertained a doubt as to the good faith of these defendants, the application was dismissed, with costs. *The Anglo-Canadian Mortgage Co. v. Cotter et al.*, 8 P. R. 111.—Dalton, Q. C.

In an action of ejectment and for mesne profits, the defendant O. was tenant in possession, and had two months after the service of the writ upon him, paid rent to his co-defendant, his landlord. An application by O. to have his name struck out as a party to the suit, he having gone out of possession on the expiration of his lease, was refused with costs. *Johnston v. Oliver*, 9 P. R. 353.—Dalton, Master.

See *McCarthy v. Arbuckle*, 31 C. P. 48, p. 617.

3. Statement of Claim.

A writ in ejectment was served on 15th August, 1881, and an appearance entered after the 22nd of the same month:—Held, that plaintiff need not file a statement of claim, under the new practice, and that a notice of trial served immediately after the entry of the appearance was regular, the cause being then at issue. *Laidlaw v. Ashbaugh*, 9 P. R. 6.—Dalton, Master.

Held, that the mention of the date of issue of a writ of ejectment in a statement of claim was

essential. But leave was given to amend on payment of costs. *Scott v. Creighton*, 9 P. R. 253.—*Dalton, Master*.

4. Counter Claim.

In ejectment the defendant was allowed to set up a counter claim for dower out of the lands in question. Remarks as to the form of decree in such a case. *Glass v. Glass*, 9 P. R. 14.—*Osler*.

In an action for the recovery of land and for mesne profits, a counter claim for damages for illegal distress against the plaintiff and his bailiff who executed the distress was held good. *Dockstader v. Phipps*, 9 P. R. 204.—*Dalton, Master*.

5. Equitable Defences.

In ejectment where equitable issues are raised under R. S. O. c. 50, s. 257, the issues must be tried without a jury. *Bryan v. Mitchell*, 8 P. R. 302.—*Dalton, Q. C.*—*Armour*.

Per Gwynne, J. :—That under the practice which prevailed in England in 1870, which practice was in force in Manitoba under 38 Vict. c. 12, at the time of the bringing of this suit, an equitable defence could not be set up in an action of ejectment. *Farmer v. Livingstone*, 5 S. C. R. 221.

6. Judgment.

See *Trust and Loan Co. v. Jones* 8 P. R. 65, p. 230 ; *Trust and Loan Co. v. Hill*, 9 P. R. 8, p. 393.

IV. MESNE PROFITS.

Quære as to when mesne profits may now be recovered in ejectment. *McCarthy v. Arbuckle*, 31 C. P. 405.

See *Dockstader v. Phipps*, 9 P. R. 204, *supra* ; *Johnston v. Oliver*, 9 P. R. 353, p. 230.

ELECTION.

I. OF DIRECTORS—See CORPORATIONS.

II. WIDOW'S ELECTION—See DOWER.

III. OF MEMBERS OF MUNICIPAL COUNCILS—
See MUNICIPAL CORPORATIONS.

IV. OF MEMBERS OF PARLIAMENT OR LEGISLATIVE ASSEMBLY—See PARLIAMENTARY ELECTIONS.

V. OF SCHOOL TRUSTEES—See PUBLIC SCHOOLS.

VI. UNDER WILLS—See WILL.

Where land was advertised for sale under a decree, and the purchaser, the owner of the adjoining lot, who had also been in possession by his son of the advertised premises, tendered for them, knowing that the lands comprised fewer acres than the advertisement stated, and intending to seek an abatement after the purchase was complete, and a subsequent incumbrancer offered

to give the same price for them as the purchaser :—Held, that the petitioner should be put to his election, either to take the land without abatement of the purchase money, or let it go to the subsequent incumbrancer. *Carmichael v. Ferris*, 8 P. R. 289.—*Stephens, Referee*.—*Blake*.

Where the plaintiff filed his bill seeking to quash a certain municipal by-law, passed to open a road, and also an award made thereunder :—Held, that there was nothing inconsistent in this, and the plaintiff was not bound to elect between attacking the by-law and attacking the award. Where, however, under such circumstances, the plaintiff, being called on by the court to elect, had elected to attack the award, and consented to a decree setting it aside, and ordering a new arbitration, which arbitration he had prosecuted until another award was made, which he had not moved against within the time allowed therefor :—Held, he could not afterwards complain of having been forced to elect at the hearing. *Harding v. Corporation of the Township of Carleton Place*, 2 O. R., Chy. D 329.

See *Macdonald v. Worthington*, 7 A. R. 531, p. 765 ; *Cruso v. Bond*, 1 O. R. 384, p. 472.

EMBLEMENTS.

See CROPS—LANDLORD AND TENANT.

EMINENT DOMAIN.

See MUNICIPAL CORPORATIONS—RAILWAY AND RAILWAY COMPANIES.

Right of tenant to compensation. See *In re Welland Canal Enlargement*—*Fitch v. McRae*, 29 Chy. 139, p. 113.

ENTAIL.

See ESTATE.

EQUITABLE ASSIGNMENT.

See CHOSE IN ACTION.

EQUITABLE PLEAS.

See PLEADING.

ERROR.

See CRIMINAL LAW.

ESCHEAT.

Held, affirming the judgment of Proudfoot, V. C., 26 Chy. 126, that the doctrine of escheats

applies to Ontario; that the Attorney-General for Ontario is the proper person to represent the Crown and to appropriate the escheat to the uses of the Province; that the Court of Chancery has jurisdiction in such a case; and that it was proper for the Attorney-General to file a bill in the Court of Chancery to enforce the escheat. *Attorney-General of Ontario v. O'Reilly*, 6 A. R. 576. See *S. C. sub nom. The Attorney-General of Ontario v. Mercer*, 5 S. C. R. 538; 8 App. Cas. 767, p. 121.

ESTATE.

- I. ESTATE AT WILL—See LIMITATIONS OF ACTIONS AND SUITS.
- II. FOR YEARS—See LANDLORD AND TENANT.
- III. FOR LIFE.
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 2. Tenant by the Curtesy, 234.
 3. Dower—See DOWER.
- IV. ESTATE TAIL.
 1. Barring, 235.
- V. ESTATE IN FEE, 235.
- VI. ESTATE BY ENTIRETIES, 235.
- VII. JOINT TENANTS, 235.
- VIII. TENANTS IN COMMON, 236.
- IX. TRUST ESTATES—See TRUSTS AND TRUSTEES.
- X. ADMINISTRATION OF—See EXECUTORS AND ADMINISTRATORS.
- XI. PARTITION OF—See PARTITION.
- XII. STATUTE OF DISTRIBUTIONS—See DISTRIBUTION OF ESTATE.
- XIII. BY DEVISE—See WILL.
- XIV. OF PARTICULAR PERSONS.
 1. Married Women—See DOWER—HUSBAND AND WIFE.
 2. Infants—See INFANT.
 3. Lunatics—See LUNATIC.
 4. Tenants—See LANDLORD AND TENANT.

III. ESTATE FOR LIFE.

1. Generally.

R. G., being seised in fee, by an instrument purported to lease to his daughters "three acres, with the right of way to a well, including an orchard and dwelling house, after the decease of his beloved wife, J. G.," to hold to his daughters for and during their lives, or the life of the survivor of them, at the yearly rent of 20c., if demanded. Ten days afterwards he conveyed in fee to his son W. G., the land of which the three acres formed part, the son having actual notice of the agreement between his sisters and R. G. Subsequently, W. G., conveyed to the plaintiff, "subject to the right of (R. G.'s wife and daughters) to occupy the house and three acres during the life of them or the survivor, and the right to and from the well," and subject to

a mortgage, which the plaintiff agreed to pay off. To this deed the plaintiff was an executing party. The plaintiff brought ejectment against R. G.'s daughters for the three acres.—Held, that the agreement by which R. G. intended to demise the three acres created a term at once, the wife of R. G. retaining the right to occupy during her life: Held, also, that the words "subject to," &c., in the conveyance to the plaintiff, either operated as an exception, or, by reason of the execution of the deed by the plaintiff, as a re-grant of the three acres to her vendor. In either case, therefore, the plaintiff was entitled to succeed. Quære, also, if the deed operated as a re-grant to W. G., whether if the lease were void, as contended, as creating a freehold interest to commence in futuro, W. G., having notice of his sisters' claim under it, would not be restrained from disturbing them. *Wilson v. Gilmer et al.*, 46 Q. B. 545.

The word "demise" is an effective word to convey an estate of freehold, and is of like import with, and equivalent to the word "grant." An estate for life was therefore held to be validly created by the words "demise and lease" to E. M. for life; and livery of seisin was held unnecessary. *Spears v. Miller*, 32 C. P. 661.

A tenant for life is entitled to a partition, and where there is a right to a partition there may be a right to a sale as the Court may determine. *Lalor v. Lalor*, 9 P. R. 455.—Proudfoot.

Held that a lease for life to a husband and wife makes them tenants by entireties, so that the whole accrues to the survivor. *Leitch v. McLellan*, 2 O. R., C. P. D. 587.

J. T. S. devised certain lands to M. H. for life, and afterwards to any child of M. H. who might survive her, in fee. M. H. had one child, aged ten, when she petitioned under 19-20 Vict., c. 120, (Imp.) claiming to be allowed for expenditure made by her upon two houses on the land for much needed repairs and lasting improvements, and also for \$100, paid to a tenant for improvements made by him under a promise from the testator that he should be paid for them; and praying for a sale, or power to lease:—Held, that M. H. might be reimbursed the \$100, from the testator's general estate, as this appeared to have been a debt due by the testator; but neither this nor the other expenditure could be charged on the land: Held, further, it appearing that there was no means from the income of the property of putting it into a sufficiently remunerative condition to support M. H., and her child, it was a proper case for the sale or leasing of the estate, with a right to build. The repairs of a tenant for life, however substantial and lasting, are his own voluntary act, and do not arise from any obligations, and he cannot charge the inheritance with them. *Re Smith's Trusts*, 4 O. R., Chy. D. 518.

See *Turley v. Benedict et al.*, 7 A. R. 300; *Reid v. Reid*, 29 Chy. 372, p. 223.

2. Tenant by the Curtesy.

A testator devised his property to trustees, in trust to pay the rents and profits to his wife durante viduitate, and if she married again she was to have an annuity, and the property was

to be applied as directed for the benefit of the children, and divided among them when the youngest came of age. One daughter married, and died before the period of division, leaving a husband and two children. The testator's widow married again before the death of the daughter:—Held, that the husband of the daughter was tenant by the curtesy of her share. *Jones v. Dawson*, 8 P. R. 481.—Proudfoot.

Deed in fee made by tenant by the curtesy.—Effect of. See *McGregor v. McGregor*, 27 Chy. 470.

IV. ESTATE TAIL.

1. *Barring.*

Although under R. S. O. c. 100, s. 9, a mortgage in fee simple by a tenant in tail vests the fee simple in the mortgagee, the registration of a discharge of such mortgage, in accordance with R. S. O. c. 111, s. 67, does not reconvey the estate to the tenant in tail barred of the entail; it operates only as a reconveyance of the original estate of the mortgagor. *Lawlor v. Lawlor et al.*, 6 A. R. 312. Reversed by Supreme Court.

V. ESTATE IN FEE.

Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees, "their heirs and assigns forever, all and singular," the mortgaged land, habendum "as and for all the estate and interest" of the grantors "in and to the same":—Held, sufficient to pass the fee to the grantees. *Bright v. McMurray*, 1 O. R., Chy. D. 172.

A husband and wife were the parties of the third part in a conveyance, whereby the wife's father, did "grant unto the said party of the third part his heirs and assigns forever," &c., habendum "unto the said party of the third part, his heirs and assigns, to and for his and their sole and only use forever":—Held, that by the operation of the Statute of Uses, the husband took an estate in fee simple. *Re Young*, 9 P. R. 521.—Boyd.

See *Re Morse*, 8 P. R. 475, *infra*.

VI. ESTATE BY ENTIRETIES.

See *Leitch v. McLellan*, 2 O. R. 587, p. 234; *Griffin v. Patterson et ux.*, 45 Q. B. 536, p. 236. *Re Morse*, 8 P. R. 475, *infra*.

VII. JOINT TENANTS.

Where a deed in a chain of title had been made to a husband and wife as joint tenants:—Held, following *Shaver v. Hart*, 31 Q. B. 603, that notwithstanding the terms of the deed the husband and wife took by entireties. And where the husband made a conveyance of the same land in the lifetime of his wife, she merely joining to bar her dower, and she predeceased her husband:—Held, that the husband's deed conveyed the fee. *Re Morse*, 8 P. R. 475.—Blake.

Two several lots were conveyed, by the deed in trust set out in the report, to C. and A. res-

pectively to the use of G. and A., their heirs and assigns, as joint tenants, and not as tenants in common:—Held, that under the provisions of such deed, the grantees took the respective lots in severalty. *Adamson v. Adamson*, 7 A. R. 592.

VIII. TENANTS IN COMMON.

Per *Armour, J.* Quære, whether the effect of the Married Woman's Acts may not be to do away with the estate by entireties, and make husband and wife, when devisees, tenants in common. *Griffin v. Patterson et ux.*, 45 Q. B. 536.

The defendant, husband of one of several tenants in common, being in possession of the joint estate, purchased the same at sheriff's sale, of which fact the co-tenants were aware, but took no steps to impeach the transaction until after such a lapse of time as that under the statute the defendant acquired title by possession. The Court, on a bill filed by the other tenants in common, asking to set aside the sheriff's sale and deed on the ground of fraud and collusion between the defendant and execution creditor, negatived such charges, and dismissed the bill, with costs. *Kennedy v. Bateman*, 27 Chy. 380.

See *Lapointe v. Lafleur*, 46 Q. B. 16, p. 202.

ESTOPPEL.

1. BY DEED, 236.

II. IN PAIS.

1. *Against Denying Liability*, 237.
2. *Giving a Receipt*, 237.
3. *Other Cases*, 237.

III. BY PLEADING, 239.

IV. BY JUDGMENT.—See JUDGMENT.

V. AS BETWEEN LANDLORD AND TENANT— See LANDLORD AND TENANT.

I. BY DEED.

G. W. F., being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half of the lot to J. B. P., who conveyed it to trustees, to hold in trust for E. F., wife of G. W. F., upon certain trusts declared in the deed, and without power to her to anticipate. The deficiency was subsequently discovered and upon the application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land as compensation for the deficiency was made to the trustees of E. F., describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P., of the first part, and E. F., wife of G. W. F., of the second part, and the trustees of the third part, which recited the facts and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F., whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the

trustees held them as trustees for G. W. F., the patentee of the original lot. After this the trustees, by the direction of G. W. F. conveyed to E., under whom the defendants' claimed. E. F. now brought this action to recover the land :— Held, (Hagarty, C. J., dissenting) that E. and those claiming under him must be held to have had notice of the title of the trustees, who were described in the patent as trustees of E. F. : that this land was subject to the trusts of the previous conveyance to them : that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover. *Foott v. Rice et al.*, 4 O. R., Q. B. D. 94.

See also, *Edwards v. Morrison et al.*, 3 O. R. 428 ; *Pierce Canavan*, 29 Chy. 32.

II. IN PAIS.

1. Against Denying Liability.

The plaintiff's valuator, one H. filled in the blanks in an application for a loan on statements of one S. who forged the names of J. T. B. and I. B. as applicants, and although H. had never seen the property or the applicants, he certified a valuation to the plaintiffs, who accepted the loan, and signed his name as witness to the signatures of the applicants. Cheques in payment thereof to the order of the supposed borrowers were obtained by S., who forged the name of the payees, endorsed his own name, and received payment of the cheques, which were drawn upon the defendants, through other banks, who presented them to the defendants and received payment in good faith. The fraud was not discovered for some time, during which the cheques were returned to the plaintiffs at the end of the month as paid, and the usual acknowledgement of the correctness of the account was duly signed :— Held, that the plaintiffs were not estopped from recovering the amount paid on the forged endorsements from the defendants by their agent's negligence, as it did not occur in the transaction itself, and was not the proximate cause of their loss. *Agricultural Savings and Loan Ass. v. Federal Bank*, 6 A. R. 192 ; 45 Q. B. 214.

The note upon which this action was brought had not been properly stamped, and it was urged that it could not be a payment or satisfaction of one of which it was intended to be a renewal :— Held that the plaintiff being aware of the objection to the unstamped note, and receiving it in lieu of the paper which he held, could not urge this as an objection, he having declared upon it as a promissory note. *Baillie v. Dickson*, 7 A. R. 759.

2. Giving a Receipt.

Held, that defendants were not under the circumstances of this case bound by their admission on the policy of the receipt of this premium. See *Western Ass. Co. v. Provincial Ins. Co.*, 5 A. R. 190.

See *Agricultural Savings and Loan Association v. Federal Bank*, 6 A. R. 192, *supra*.

3. Other Cases.

The defendant in this case having had the certiorari directed to the magistrate who convicted

was held to be estopped from objecting that the conviction was in reality made by three as appeared from the memorandum of conviction which was signed by them. *Regina v. Smith*, 46 Q. B. 442.

Held, that the applicant in this case was not precluded from moving against a by-law by reason of his having expressed an opinion in its favour before its passage. *In re Peck v. The Town of Galt*, 46 Q. B. 211.

The fact that the plaintiff had attended a meeting which had been illegally called, and had entered upon a defence before the Council, did not preclude him from afterwards filing a bill impeaching the proceedings as irregular and invalid. *Marsh v. Huron College*, 27 Chy. 605.

Semble, upon the facts stated in the report of this case, that the plaintiff, one of the directors, should be estopped from alleging that M. was not properly qualified as a director, the effect of which would have been to injuriously affect the value of bonds of the company, to the issue of which the plaintiff was a party. *Kiely v. Smyth*, 27 Chy. 220.

A creditor who had proved his claim in a creditors' suit held in this case not estopped from prosecuting an action for the same debt. See *Lee v. Credit Valley R. W. Co.*, 29 Chy. 480.

The plaintiff in this case sought to have his name removed from the list of shareholders :— Held, that though as against the company the plaintiff, had he come before the Court in good time, might perhaps have had his contract rescinded, yet his having, as the fact was, acted at a meeting of the shareholders after knowledge of what he now charged against them, precluded him from asserting any such right now, and his bill must be dismissed, with costs. *Petrie v. The Guelph Lumber Company et al.*, and two other cases, 2 O. R., Chy. D. 218.

Where certain persons were elected School Trustees, and at a meeting of the Board held subsequently to the election, were declared duly elected, but, proceedings having been meanwhile commenced to question the validity of the election, at a subsequent meeting of the Board, they acquiesced in the conclusion of the Board to hold a new election, and became candidates again, and canvassed as such, until the 20 days allowed for disputing the first election had elapsed (the proceedings formerly commenced for that purpose having been meanwhile dropped), and were not elected at the second election :— Held, they could not afterwards maintain a suit to have it declared they were the duly elected trustees. *Foster et al v. Stokes et al.*, 2 O. R., Chy. D. 590.

The plaintiff filed his bill on the 14th March, 1874. On the 31st of the same month, an attachment in insolvency was issued by the defendant against the plaintiff. The decree dismissed the plaintiff's bill, with costs, in October, 1874. Defendant proved against the estate for the costs of the Chancery suit, but did not take his dividend from the assignee in insolvency, and took no further steps for the recovery of his claim until after the order for discharge of the plaintiff (25th May, 1877), when he issued execution. On the application of the plaintiff, Spragge, C., refused to set aside the execution, holding that defendant was entitled to issue it, and that the

proving against the estate for the costs of suit when it was not legally provable, did not operate as an estoppel in pais between the plaintiff and defendant. *Stevenson v. Seasmith*, 8 P. R. 286.

A corporation may be bound by acquiescence as an individual may. *The Corporation of the Township of Pembroke v. The Canada Central R. W. Co.*, 3 O. R., Chy. D. 503.

The plaintiff, an execution creditor, purchased at a sheriff's sale under execution, certain lands of which the registered title was then in the execution debtor; but in a subsequent suit, by the assignee in insolvency of the husband of the execution debtor, to which, however, the plaintiff was no party, the conveyances whereby the lands had been transferred from the insolvent to his wife, the execution debtor, were declared fraudulent, and the assignee thereupon proceeded to sell the lands as part of the estate of the insolvent, the present plaintiff attending at and forbidding the sale. At this sale the defendant became the purchaser, and the proceeds of this sale, together with the other assets of the insolvent estate, were distributed by the assignee, and the plaintiff, being also a creditor, accepted a dividend:—Held, that by so accepting the dividend, the plaintiff was estopped from impeaching the sale by the assignee. *Beemer v. Oliver et al.*, 3 O. R., Chy. D. 523.

To the plea of "non est factum," the plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all parties as a valid policy, but that the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal or ordered to affix it:—Held, a good replication and not a departure from the declaration. *Wright v. London Life Insurance Co.*, 5 A. R. 218.

Held in a suit against a registrar by a municipal corporation for the proportion of fees to which the corporation was entitled under R. S. O. c. 111, that having received the money in question under the above Act he could not deny that he received it for the purposes therein provided. *County of Hastings v. Ponton*, 5 A. R. 543.

For cases of estoppel arising under contracts of Insurance. See *Omnium Securities Company v. Canada Fire and Mutual Ins. Co.*, 1 O. R. 494; *Phillips v. Grand River Mutual Fire Ins. Co.*, 46 Q. B. 334; *Fire Insurance Association et al. v. Canada Fire and Marine Ins. Co.*, 2 O. R. 481; *Russell v. Canada Life Ass. Co.*; 8 A. R. 716; *Quinlan v. Union Fire Ins. Co.*, 31 C. P. 618; 8 A. R. 376.

See also, *Watson v. Lindsay*, 27 Chy. 253; *Sommerville v. Rae*, 28 Chy. 618; *National Ins. Co. v. Egleson*, 29 Chy. 406; *Johnston v. Johnston*, 9 P. R. 259; *Miller v. Hamlin et al.*, 2 O. R. 103; *Re Martin v. English*, 5 A. R. 647; *Christopher et al. v. Noxon et al.*, 4 O. R. 672; *Coté v. The Stadacona Ins. Co.*, 6 S. C. R. 193.

III. BY PLEADING.

Per Blake, V. C. The plaintiffs having filed their bill in Ontario, must be taken to admit that

the Court has jurisdiction in respect of the matter therein embraced; and the practice of the Court requiring it, and a method having been provided for service of process out of the jurisdiction, the plaintiffs were bound to follow the practice if the objection were taken. *Exchange Bank v. Springer*, *Exchange Bank v. Barnes*, 29 Chy. 270.

See *Moore v. Buckner*, 28 Chy. 606, p. 19; *Baillie v. Dickson*, 7 A. R. 759, p. 237.

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1. MATTERS JUDICIALLY NOTICED.

Held, that a magistrate cannot take judicial notice of orders in council, or their publication, without proof thereof by production of the *Official Gazette*, and therefore that a conviction was bad which was made without such evidence that the Canada Temperance Act, 1878, was in force in the county pursuant to the terms of s. 96 thereof. *Regina v. Bennett*, 1 O. R., Q. B. D. 445.

II. ADMISSIONS.

1. By Pleadings.

A bill was filed by D. D. against I. and B., "trading as partners," and J. D. alleging a wrongful conversion by I. and B. of certain timber, the property of the plaintiff, and further alleging that J. D. was a party to an agreement set forth therein respecting the sale of the said timber as a surety only, and claiming the return of the timber, an account and damages. I. and B. in their answer admitted that the timber had been removed by them, but alleged that it had been in accordance with an agreement entered into by them with J. D., and with A., his assignee, who had a proper authority for that purpose:—Held, reversing the decision of Ferguson, J., that the whole of the admission was to be looked at, and it was not such as entitled the plaintiff to a decree because it did not admit a conversion of timber of which the plaintiff was sole owner, as alleged in the bill; but under it I. and B. might shew that J. D. had an interest in the timber and authority to act for and represent D. D. in the transaction in question. *Dovey v. Irwin et al*, 4 O. R., Chy. D. 8.

Per Armour, J. When a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue; therefore, it was, in this case, competent for C. to deny the execution of the bond, his pleading not expressly admitting it. *The Waterloo Mutual Ins. Co. v. Robinson and Clark*, 4 O. R., Q. B. D. 295.

See also *Cleaver v. The North of Scotland Canadian Mortgage Co.*, 27 Chy. 508.

2. By Parties.

See *Court v. Holland*; *Ex parte Holland and Walsh*, 8 P. R. 219, pp. 252, 257.

III. PRESUMPTIONS.

1. Non-Production of Papers.

Held, the letter from K. to the defendants might be assumed upon the evidence set out in the report to state that he had made a sale of the goods to the plaintiffs at the prices named in the list, and that as such letter was not produced at the trial, though called for by the notice to produce, the

court might, if necessary, presume that it stated anything further which might be necessary for the plaintiff's case:—Held, also, that the effect of the letter from the defendants to the plaintiffs was not impaired by the disapproval expressed therein of part of the order. *Ockley et al. v. Masson et al.*, 6 A. R. 108.

2. As to Death.

Held that the presumption of death arising from continued absence of the demandant's husband, unheard of for seven years, is sufficient to sustain an action for dower as against the objection that he is still living. *Giles v. Morrow*, 1 O. R., Q. B. D. 527.

3. Arising from Official Appointments and Acts.

Held, that if a person acts notoriously as the officer of a corporation and is recognized by it as such officer a regular appointment will be presumed and his acts will bind the corporation, although no written proof is or can be adduced of his appointment. *School Trustees of the Township of Hamilton v. Neil*, 28 Chy. 408.

The defendant was convicted of perjury alleged to have been committed in a cause tried at a Division Court held by one H. under a commission issued by the Governor-General in Council appointing him deputy judge of the County Court of the county of Victoria, during pleasure and the absence of the county judge under the leave of absence granted to him by an Order in Council:—Held, it was not necessary for the Crown to prove the Order in Council granting the leave of absence, for its existence, and that the commission was not effete by the lapse of time, would be presumed, in accordance with the general presumption of law that a person acting in a public capacity was duly appointed and authorized to act, the onus of shewing the contrary being on the defendant. *Regina v. Fee*, 3 O. R., C. P. D. 107.

4. Other Cases.

When one to whom a *devisé prima facie* beneficial to him is made neither accepts or rejects the same, but remains passive, he will be presumed to accept. *Re Defoe*, 2 O. R., Chy. D. 623.

J. and R., living at P., had dealings extending over several years with D., who lived at K., and borrowed money from him from time to time. To secure the money borrowed they executed a mortgage to D., purporting to be for \$4,000, but really intended as security for whatever should be due to them from time to time on the loan account. On taking the accounts in the master's office some years afterwards, and after J. and R. had made an assignment in insolvency, it appeared that shortly after executing this mortgage, and before so much as \$4,000 had been advanced by D., J. and R. drew on D. for \$1,500:—Held that, under these circumstances, the presumption that D. owed J. and R. the \$1,000 drawn for, was rebutted, the draft being the natural mode in which J. and R. would procure an advance on the security of the mortgage to D. *Court v. Holland et al.*, 4 O. R., Chy. D. 688.

See *Reid v. Humphrey et al.*, 6 A. R. 403. p. 75; see also *Shenck's Vote*, *Lincoln* (2) 1 H. E. C. 500; *Re O'Brien*, 3 O. R. 326.

IV. ATTENDANCE OF WITNESSES.

See *Merchants Bank v. Pierson*, 8 P. R. 123; *Schultz v. Wood*, 6 S. C. R. 585.

V. ORDERING WITNESSES OUT OF COURT.

The attorney for the respondent may be ordered out of court when a witness is being examined on a charge of a corrupt bargain for his withdrawal from the election contest, when the evidence of such witness may refer to the sayings and doings of such attorney in respect of such withdrawal. *South Oxford Election—Hopkins v. Oliver*, 1 H. E. C. 243.

See *Sivewright v. Sivewright et al.*, 8 P. R. 81, p. 247.

VI. EXAMINATION UNDER COMMISSION.

1. Application for and Issue of Commission.

Where a witness who had been previously examined under a commission, stated on affidavit that he had further evidence to give to explain or correct his former evidence:—Held, a new commission should issue to further examine him, and that in such case he should be considered as a witness for the party who desires to re-examine him:—Held, also, that strong suspicion of a depraved motive in the witness for desiring to be re-examined, was not a sufficient ground upon which to resist the application. *Rogers v. Manning*, 8 P. R. 2.—Hagarty.

The Referee made an order striking out as impertinent certain interrogatories to be administered to a witness under a commission:—Held, on appeal, that the Referee has no jurisdiction to strike out interrogatories for impertinence. The proper course is, for the witness to demur to the impertinent question. *Williams v. Corby*, 8 P. R. 83.—Proudfoot.

Where a commission was issued to England to take evidence in a case involving many intricate questions of fact, the evidence was ordered to be taken on *viva voce* questions, instead of upon interrogatories. *Watson et al. v. McDonald*, 8 P. R. 354.—Osler.

On an application for a foreign commission to examine a witness who is travelling, it should be shewn that he will remain at the place to which the commission is directed a sufficient time to allow of its due execution. *Singer et al. v. Williams Manufacturing Co.*, 8 P. R. 483.—Blake.

A commission to examine witnesses in a foreign country may be issued in the case of the trial of an election petition. *Cornwall Election—Maclellan v. Bergin*, 1 H. E. C. 803.

Where an application for a commission to examine a witness in New York, was made before an official referee, and referred by him to a judge, it was—Held that matters coming within the jurisdiction of any officer of the Court should be disposed of by him in the usual way, and the parties might then appeal from such decision. *Hughes v. Rees*, 9. P. R. 86.—Boyd.

Where an order was made for a commissioner to examine one M. viva voce and other witnesses on interrogatories :—Held, that the commission could not issue to examine M. only, without amending the order. *Smith v. Babcock*, 9 P. R. 175.—Proudfoot.

2. Cross Interrogatories.

When a foreign commission issues on the master's certificate, under G. O. 221, cross interrogatories should be filed in the office of the clerk of records and writs; and where they were filed by a defendant in the master's office instead, and notice of filing given, but by accident the commission was forwarded without them, an application made on the return of the commission executed to suppress the depositions was refused, with costs. *Darling v. Darling*, 8 P. R. 391.—Taylor, Master.—Proudfoot.

3. Return of.

Where the instructions directed that the depositions must be subscribed by the witness, and a witness could not write, the commissioner certified to that fact, and the interpreter and commissioner signed their names :—Held, sufficient. *Darling v. Darling*, 8 P. R. 391.—Taylor, Master.—Proudfoot.

On the facts stated in the judgment :—Held, that the interpreter was not such an agent or correspondent of the complainant as would justify the suppression of the depositions on that ground. *Ib.*

The commissioner was an Italian, and the instructions to him were in English :—Held, no objection, as it did not appear that the commissioner was unacquainted with the English language. *Ib.*

That it did not appear that the commissioner took down the evidence :—Held, immaterial, under the instructions set out in the report. *Ib.*

The depositions of the claimant were taken by one commissioner, and those of a witness by another :—Held, also immaterial. *Ib.*

The time for the return of a foreign commission was extended from the 1st February, by an order of the master in ordinary, in the following terms : "I extend the time for the return of the commission peremptorily to the 24th February." The witnesses were examined viva voce on the 24th February, all parties being represented :—Held, that the master was wrong in excluding this evidence, as the commission being executed on the 24th February, there was no irregularity because of the necessary delay occasioned by its transmission from a foreign country, and in any event, the effect of the plaintiffs being represented at the examination was to waive any objection that the evidence was not returned to the master's office by the 24th February. *Darling v. Darling*, 9 P. R. 560.—Boyd.

4. Costs.

The plaintiff obtained an order for the issue of a foreign commission to examine a witness. The order contained the usual direction that the costs

be costs in the cause. The evidence was taken, but neither the plaintiffs who succeeded in the suit, nor the defendant, put it in at the trial :—Held, that the direction in the order as to costs did not preclude the taxing officer from disallowing the costs to the plaintiffs on the ground that the evidence had not been used. *Dominion, etc., Co. v. Stinson*, 9 P. R. 177.—Boyd.

VII. LETTERS ROGATORY.

Held, that the Act 31 Vict. c. 76 (D) is not ultra vires of the Dominion Parliament, for the taking of evidence in one of the provinces for use in foreign tribunals is not a subject which is assigned to the exclusive legislative authority of the province by sec. 92 of the British North America Act, inasmuch as such proceedings are of extra provincial pertinence, and do not relate to civil rights in the province. *Re Wetherell v. Jones*, 4 O. R., Chy. D. 713.

VIII. PRELIMINARY EXAMINATION OF PARTIES AND WITNESSES.

1. Order.

(a) Service of.

Held, that service on the defendant's attorney at his home at 9.30 p.m. on Saturday of an order and appointment to examine the defendant at 2 p.m. on the following Tuesday, was irregular, the notice not being sufficient :—Held, that Rule of Court 135, applies to the service of orders and appointments to examine, and that this service must be treated as if made on the following Monday. *Senn v. Hewitt*, 8 P. R. 70—Q. B.

An appointment was made ex parte by the master at Ottawa, for the examination of the defendant at his office in Ottawa. A copy of the appointment and of a subpoena were served on the defendant, who resided in Hull, P. Q., and a copy of the appointment was served on the defendant's solicitor :—Held, that the proceedings were regular, and warranted by G. O. Chy. 138, following Moffatt v. Prentice, 6 P. R. 33, and that consequently relief might be had on the defendant's failure to attend under G. O. Chy. 144, and also that the appointment might be made ex parte. Semble, this mode of examination, and that provided for by R. S. O. c. 50, are not interfered with by the O. J. Act, s. 52. *Bank of British North America v. Eddy*, 9 P. R. 396.—Osler.

(h) Attendance for Examination.

A party out of the jurisdiction will be ordered to attend to be examined at that place within the jurisdiction where, in the opinion of the court it is most expedient that the examination should be held, and not necessarily that nearest to his place of abode. *Smith v. Babcock* 9 P. R. 97.—Proudfoot.

See *Bank of British North America v. Eddy*, 9 P. R. 396, *supra*.

2. Re-Examination.

A party having before judgment examined another party to the cause adverse in interest.

under R. S. O. c. 50, s. 156, is not entitled to a re-examination of the same party except under the most special circumstances. *Thorburn v. Brown*, 8 P. R. 114.—Dalton Q. C.

See *Rogers v. Manning*, 8 P. R. 2, p. 244.

3. Fees and Costs.

Where an examination of parties pursuant to R. S. O. c. 50, s. 161, takes place before a Deputy Clerk of the Crown, though not designated in the order as acting in his official capacity, the fees for such examination are payable in stamps, and not in money. *Denmark v. McConaghy*, 8 P. R. 136.—Osler.

The parties in an action for breach of promise of marriage not being competent or compellable witnesses for each other, the plaintiff was not allowed the costs of the preliminary examination of the defendant, under R. S. O. c. 50, s. 156. But the plaintiff's costs of his own examination were allowed, as this took place at the instance of the defendant. *Woodman v. Blair*, 8 P. R. 179.—Dalton, Q. C.

4. Other Cases.

Where an order to examine a party to a suit has been granted before the trial, such examination cannot be had after the trial has taken place; and it was so held where the verdict rendered at the trial was a nominal verdict only, subject to a reference to arbitration. *Shelly v. Hussey*, 8 P. R. 250.—Dalton, Q. C.

Upon the examination of two defendants before a Master, he, at the request of their solicitor, directed two other defendants present on behalf of the plaintiff, who was too ill to attend, to withdraw, but they refused. The Master thereupon declined to proceed with the examination:—Held, on appeal, that the Master should have allowed one defendant to be present on behalf of the plaintiff, if he was satisfied that this was required for the proper representation of the plaintiff's interest, but by analogy to R. S. O. c. 50, s. 260, he might require such defendant to be examined first, if he was to be called as a witness. *Siveuright v. Siveuright et al*, 8 P. R. 81.—Spragge.

A defendant whose interest is identical with that of the plaintiff, is a party adverse in interest to his co-defendant, and may be examined by his co-defendant under G. O. 138. When the plaintiff's solicitor is present at such examination it may be read at the hearing against the plaintiff. The successful defendant will be allowed the costs of such examination. *Moore v. Boyd*, 8 P. R. 413.—Taylor, Master.

The master in Chambers has power under Rule 285, O. J. Act, to direct evidence to be taken at any stage of the proceedings in a cause. In this case a witness about to leave the country was examined before a special examiner, under a Chamber order, during a reference in the master's office, on which his evidence was to be used. *Re Dunsford—Dunsford v. Dunsford*, 9 P. R. 172.—Dalton, Q. C.

Rule 285, O. J. Act, applies to examinations for discovery before trial, and the examination

of a defendant may be had under it before defence filed. An examination may be obtained under it at any stage of the cause and though no motion is pending. *Fisken v. Chamberlain et al*, 9 P. R. 283.—Boyd.

The bill alleged that the defendant assisted in the fraud by which the plaintiff was induced to convey certain land to her husband, the other defendant. H. answered the bill denying all charges of fraud, disclaiming all interest in the subject matter of the suit, and asking for her costs:—Held, that it was competent for the plaintiff on cross-examining the defendant on her answer and disclaimer, to establish if possible the fraud out of her own mouth. *McFarland v. McFarland*, 9 P. R. 73.—Boyd.

An action having been brought in the Chancery Division to set aside a judgment as fraudulent the plaintiff took out an appointment for the examination of the defendant after the delivery of the statement of defence, but before the close of the pleadings:—Held, that the former Chancery practice must apply to actions in the Chancery Division in the case of examinations for discovery. Rule 219 O. J. Act refers to an existing practice which is not repealed by the Act. *Davis v. Wickson*, 9 P. R. 219.—Dalton, Master.

If the issues between co-defendants are material to the case of the plaintiff or to the character of the relief which he seeks, he may examine a defendant upon them, though there is no issue between that defendant and himself. *Alexander v. Diamond et al*, 9 P. R. 274.—Ferguson.

Discovery by means of oral examination under R. S. O. c. 50, s. 156, et seq., is limited to cases in which the party to be examined is compellable to give evidence by or on behalf of the opposite party. *Jones v. Gallon*, 9 P. R. 296.—Osler.

Held, that the assistant or sub-editor of the defendants was an officer of the company examinable for the purpose of discovery under R. S. O. c. 50, s. 156. *Maitland v. Globe Printing Co.*, 9 P. R. 370.—Osler.

Semble, that a person who has ceased to be an officer of a corporation cannot be examined for discovery under 42 Vict. c. 15, s. 7, and rule 227 O. J. Act, unless the matters in respect of which he is sought to be examined occurred while he was such officer. *Id*.

In an action of replevin a party was added as a defendant at the instance of the defendant, who claimed indemnity against him on the ground of a warranty. After issue the plaintiff obtained from the judge of the County Court of Lambton an order to examine the third party:—Held, that though on the face of the pleadings there was no direct issue between the plaintiff and third party, yet as the latter had all the rights of the defendant, and virtually took his place, the case was within the spirit, at all events, of rule 224 O. J. Act, and that the examination should be allowed. *Bradley v. Clarke*, 9 P. R. 410.—Dalton, Master.—Cameron.

IX. INSPECTION AND DISCOVERY OF DOCUMENTS.

1. Order to Produce.

In an administration suit, where certain creditors produced promissory notes as vouchers for

nearly all their claim, the master, as of course, ordered production of the books and accounts. On appeal, *Prondfoot*, V. C. held (8 P. R. 86,) that in the first instance (no special cause for investigating the account being made out,) the master should have accepted as sufficient the offer of the creditors to allow an inspection of the books and accounts at their office:—Held, reversing this decision, that the executors were also entitled to an affidavit identifying the books and accounts as being all in their possession relating to the claim. *Re Ross Estate*, 5 A. R. 82.

Orders to produce under G. O. 134, are made for the purposes of the hearing only, and such orders will not be enforced for the purposes of a reference:—the proper course is an application to the master, to whom matters in dispute have been referred. *Hilderbrom v. McDonald*, 8 P. R. 389.—*Stephens, Referee*.

Where a person of unsound mind sues by a next friend, the usual præcipe order that the plaintiff do produce is proper, and is sufficiently obeyed by the affidavit of the next friend. *Traviss v. Bell*, 8 P. R. 550.—*Boyd*.

The defendants had filed and delivered their statement of defence, but the pleadings had not been closed:—Held, that the plaintiff was entitled to the præcipe order for production. *Dale v. Hull et al.* 9. P. R. 106.—*Proudfoot*.

2. Withholding on the ground of Privilege.

In an action to restrain the infringement of a patent, in which the defence set up that the supposed invention had been previously patented in the United States and England, copies of American patents material to the defendant's case, were procured by his solicitors for their own motion for the purposes of the action:—Held, that such documents were privileged from production. *The Guelph C. Co. v. Whitehead*, 9 P. R. 509.—*Dalton, Master*.

In an action on a promissory note given by the defendant to the plaintiffs in payment of a quantity of pads made by the plaintiffs, and said to possess curative properties when applied to the body, the defence was, that the note was obtained by fraud and that the pads purchased were useless and possessed no healing properties. The defendant demanded production and discovery of the formula or recipe from which the pads were made, in order to shew that they were valueless, which the plaintiffs refused on the ground that no representation was made as to their ingredients, that the composition was a secret not patented, and that discovery would injure them in their business:—Held, that the defendant was not entitled to the discovery. *Star Kidney Pad Co. et al. v. Greenwood*, 3 O. R., Q. B. D. 280.

As to offers between litigating parties made without prejudice. See *The Corporation of the County of York v. The Toronto Gravel Road and Concrete Co.*, 3 O. R. 534, p. 260.

3. Other Cases.

An action was brought upon the covenant contained in a chattel mortgage which covered goods

in the United States, and which was not registered in Ontario:—Held, on an application for inspection of the mortgage, that the court had power, irrespective of the Common Law Procedure Act, to order inspection of the mortgage in question, or of any document sued upon. *Emmens v. Middlemiss*, 8 P. R. 320.—*Dalton, Q. C.*

Semble—Per Spragge, C. J. O., and Patterson, J. A., although a party to a cause may be entitled to call for the production of documents, in order to obtain discovery, it does not follow that the contents of such documents are in themselves evidence. *The Canada Central Railway Co. v. McLaren*, 8 A. R. 564.

See *Merchants' Bank v. Pierson*, 8 P. R. 123, p. 37.

X. EVIDENCE AND EXAMINATION OF WITNESSES AT TRIAL.

1. Refusing to Answer.

Plaintiff (respondent), a teller in a bank in New York, absconded with funds of the bank, and came to St. John, N.B., where he was arrested by defendant (appellant), a detective residing in Halifax, N. S., and imprisoned in the police station for several hours. No charge having been made against him he was released. While plaintiff was a prisoner at the police station, the defendant went to plaintiff's boarding house and saw his wife, read to her a telegram, and demanded and obtained from her money she had in her possession, telling her that it belonged to the bank and that her husband was in custody. In an action for assault and false imprisonment, and for money had and received, the defendant pleaded, inter alia, that the money had been fraudulently stolen by the plaintiff at the city of New York, from the bank, and was not the money of the plaintiff; that defendant, as agent of the bank, received the money to and for the use of the bank, and paid it over to them. Several witnesses were examined, and the plaintiff being examined as a witness on his own behalf did not, on cross-examination, answer certain questions, relying, as he said, upon his counsel to advise him, and on being interrogated as to his belief that his so doing would tend to criminate him, he remained silent, and on being pressed he refused to answer whether he apprehended serious consequences if he answered the question proposed. The learned judge then told the jury that there was no identification of the money, and directed them that, if they should be of opinion that the money was obtained by force or duress from plaintiff's wife, they should find for the plaintiff:—Held (Henry J. dissenting), that the defendant was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him. *Pquer v. Ellis*, 6 S. C. R. 1.

2. Other Cases.

Held, in this case, that it was unnecessary that the denial in the answer should be met by more than the plaintiff's own evidence, for the defendant had been examined, and had furnished sufficient ground for discrediting himself. *Mcberly v. Brooks*, 27 Chy. 270.

Per Wilson, C. J.—A party calling the opposite party as a witness makes him his witness to all intents and purposes. *Dunbar v. Meek*, 32 C. P. 195.

Per Wilson, C. J.—Where the materiality of certain enquiries is obvious, and is assumed at the trial, as *e. g.* in the present case with regard to the temperate habits or otherwise of the deceased, there is no need to submit it to the jury. *Russell v. The Canada Life Assurance Co.*, 32 C. P. 256.

The defendants appeared by the same attorney, pleaded jointly by the same attorney, and their defence was, in substance, precisely the same, but they were represented at the trial by separate counsel. On examination of one of the plaintiff's witnesses, both counsel claimed the right to cross-examine the witness;—Held (affirming the ruling of the judge at the trial), that the judge was right in allowing only one counsel to cross-examine the witness. *Walker v. McMillan*, 6 S. C. R. 241.

See also *Macdonald v. Worthington, et al.*, 7 A. R. 531; *Murray et al. v. The Canada Central R. W. Co.*, 7 A. R. 646.

XI. JUDICIAL OFFICIAL AND OTHER PUBLIC DOCUMENTS.

1. Judgments.

(a) Proof of.

In an action of damages for malicious arrest and imprisonment of plaintiff, under a *capias*, issued by a stipendiary magistrate in Nova Scotia, whose judgment, it was alleged, was reversed in appeal by the Supreme Court of Nova Scotia, oral evidence—"that the decision of the magistrate was reversed," was deemed sufficient evidence by the judge at the trial of the determination of the suit below:—Held, reversing the judgment of the Supreme Court of Nova Scotia, that such evidence was inadmissible, and was not proper evidence of a final judgment of the Supreme Court of Nova Scotia. *Gunn v. Cox*, 3 S. C. R. 296.

As to obtaining judgment under rule 322 O. J. Act, in an action on a foreign judgment where the recovery of the foreign judgment has been put in issue by the pleadings. See *Henebery v. Turner*, 2 O. R. 284.

2. Other Documents.

Held, that a notarial copy of an assignment in insolvency may be received as evidence of such assignment under C. S. C. c. 80, s. 2. *Prescott Election—McKenzie v. Hamilton*, 1 H. E. C. 1.

Held, that the County Court judge's order to arrest was well proved, under R. S. O. c. 62, s. 28, by the production of a copy certified as such, under the hand of the clerk of the court; but that the affidavit on which the *capias* issued, filed in that court, was not duly proved by the production of a copy of the affidavit similarly certified, and with a seal attached, apparently that of the court, but not referred to or described in the certificate. *Timmins v. Wright*, 45 Q. B. 246.

Two partners in business (T. & R. O'Neill) executed two mortgages in favour of J. W., W. assigned the mortgages to H., by way of derivative mortgage, on the 21st March, 1877. In January, 1877, the O'Neills became insolvent, and the plaintiff, their assignee, filed a bill to redeem these mortgages. After decree W. became insolvent, and the suit was revived in the name of P. & P., his assignees, in his stead. On the reference, H. claimed so much of the amount due on the original mortgages as would satisfy his derivative mortgage, and P. claimed the remainder. Against their claims the plaintiff filed two similar surcharges, one against H. and the other against P. & P. In support of his surcharges the plaintiff offered the following evidence: 1. A certified copy of the evidence taken in an action at law brought by the plaintiff against W., in which he recovered judgment, in the spring of 1879, for a considerable sum as the unpaid purchase money for goods sold by the O'Neills to W. A certified copy of the judgment of the Court of Common Pleas a rule for a new trial, and an exemplification of the judgment roll. 2. A certified copy of the depositions of W. taken in this suit before the Master at Cobourg prior to the making of the decree:—Held, 1. That the evidence of the common law action could not be read as against either H. or P. & P., but that the evidence of W. himself might possibly be received against his assignees P. & P., as admissions made by him, and that the exemplification of the judgment might be used against his assignees to shew an indebtedness from W. to the plaintiff as assignee of the O'Neills on a particular account. 2. That the depositions of W. before the Master at Cobourg, like his answer to the suit, could be read against himself, and under the later authorities against H. also. *Court v. Holland—ex parte Holland and Walsh*, 8 P. R. 219.—Taylor, Master.

Where a petitioner under the Quieting Titles Act claimed title through a vesting order made upon a sale under a decree in an administration suit:—Held, under *Gunn v. Doble*, 15 Chy. 665, that in the absence of proof to the contrary, the order should be assumed to regular, and that it was unnecessary to give evidence shewing title. *Re Morse*, 8 P. R. 475.—Blake.

After judgment, at the trial, but before the argument in banc, the defendants put in the report of a case bearing upon the question, decided in the Supreme Court of the United States, verified by affidavit:—Held, admissible. *Rice et al. v. Gunn et al.*, 4 O. R., Q. B. D. 579.

XII. PRIVATE DOCUMENTS.

1. Ancient Documents.

Held, that the production of an original mortgage signed by D., which was more than twenty years old, proved itself under R. S. O. c. 109, s. 1, sub-s. 1, which makes such a document evidence of the truth of the recitals contained therein until shewn to be untrue; and therefore it was evidence of the debt due thereunder, and could be used as such against the sons. *Allan v. McTavish*, 28 Chy. 539; 8 A. R. 440.

2. Telegrams.

In an election trial the court ordered the agent of a telegraph company to produce all telegrams

sent by the respondent and his alleged agent during the election, reserving to the respondent the right to move the Court of Appeal on the point. *South Oxford Election—Hopkins v. Oliver*, 1 H. E. C. 243.

XIII. PAROL EXPLANATION OR VARIATION OF DOCUMENTS.

The defendant, after a note payable to the plaintiff had become due, and while it remained unpaid, endorsed upon it the following words:—"I guarantee the payment of the within note to Messrs. T. D. & Co. (the plaintiffs), on demand." The evidence shewed that the consideration for this guarantee was the giving of time to one C., for whose debt to the plaintiff the note was given as collateral security:—Held, that the evidence that the giving of time to C. was the consideration for the guarantee did not contradict the latter, though it was expressed to be "on demand;" for these words referred to a demand upon the guarantor after forbearance to press C.; and that such forbearance was a good consideration. *Davies v. Funston*, 45 Q. B. 369.

A mortgage on a vessel was executed to secure the purchase money and registered with the customs, and annexed to it was an instrument of the same date under seal executed by the defendants reciting the mortgage, and that the terms of payment were set forth therein for convenience of registry, and "this indenture is executed for the purpose of evidencing the true agreement between the parties which is hereinafter stated." The terms of payment were then stated, differing from those in the registered mortgage; and defendants covenanted to insure the vessel for \$1,400 and assign the policy to plaintiff. The alleged warranty was verbal and was not made out at the time of executing the writings, but defendants swore that they would not have bought without the warranty, and would not otherwise have given over one-third of the price for a vessel which could not be insured:—Held, that evidence of the verbal warranty was admissible; that it did not vary or alter the writings; and that the declaration that the instrument was made to evidence the true agreement referred merely to the terms of payment. *La Roche v. O'Hagan et al*, 1 O. R., Q. B. D. 300.

Parol evidence is inadmissible on a scrutiny to alter the value assessed against property in the assessment roll. *South Grenville Election—Ellis v. Fraser*, 1 H. E. C. 163.

Where a contract was expressed to sell limits Nos. 1 and 3 for the sum of \$15,500; also all the plant used in connection with the shanty now in operation on limit No. 1, included in the list made out last summer:—Held, sufficiently definite to satisfy the Statute of Frauds, since the plant referred to therein could easily be identified by parol evidence as being that specifically described in a certain writing which accompanied the above contract, and which was signed in the firm's name and by the purchaser, as also could the terms of credit to be allowed as to the payment of \$15,500, and such parol evidence was admissible though the contract imported *prima facie*, &c., a down payment of the \$15,500. *Reid v. Smith*, 2 O. R., Chy. D. 69.

As to admissibility of parol evidence that the loan company and the insurers had in effecting an insurance on mortgaged property, only the interest of the mortgagees under consideration. See *Howes v. The Dominion Fire and Marine Ins. Co.*, 2 O. R. 89; 8 A. R. 644.

Rectification of policy of insurance on ground of mistake. See *The Aetna Life Ins. Co. v. Brodie*, 5 S. C. R. 1.

The respondents sued the appellants for breach of contract to carry petroleum in covered cars from L. to H., alleging that they negligently carried the same upon open platform cars whereby the barrels in which the oil was exposed to the sun and weather and were destroyed. At the trial a verbal contract between plaintiffs and defendants' agent at L. was proved that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars and delayed in different places and in consequence a large quantity was lost. On the shipment of the oil a receipt note was given which said nothing about covered cars and which stated that the goods were subject to conditions endorsed thereon, one of which was that the defendants would not be liable for leakage or delays and that the oil was carried at the owner's risk. Per Strong, Fournier, Henry, and Gwynne, JJ. The evidence was admissible to prove a verbal contract to carry in covered cars which contract the agent at L. was authorized to enter into and which must be incorporated with the writing so as to make the whole contract one for carriage in the covered cars and that non compliance with the provisions as to carriage in covered cars prevented the appellants setting up the condition that "oil was carried at the owner's risk," as exempting them from liability. *The Grand Trunk R. W. Co. of Canada v. Fitzgerald et al.*, 5 S. C. R. 204.

The plaintiff sued the defendant, a piano maker, for a breach of a warranty given by his salesman on the sale of a piano, that the instrument was then sound and in good order. The plaintiff signed the ordinary receipt note, which is set out in the report, providing for payment of the price, and that until paid the property should remain in defendant, in which there was no mention of the warranty:—Held, that parol evidence of the warranty was admissible, as it was apparent that the receipt note was not intended to be the evidence of the whole contract. Quære, whether this question should not have been left to the jury. *McMullen v. Williams*, 5 A. R. 518.

Where certain shareholders of the G. L. Company sought to restrain a call on stock, on the ground that it was being made in contravention of the terms of a certain unwritten agreement, alleged to have been entered into between all the promoters when the company was formed:—Held, that evidence of said agreement was inadmissible, since it was contradictory of the written agreement entered into by the plaintiffs when subscribing for their shares, viz., to take stock and pay the calls when duly made. *Christopher et al. v. Noxon et al.*, 4 O. R., Chy. D., 672.

See *Mills et al. v. Kerr et al.*, 7 A. R. 767, p. 298. See also *Cameron v. Wellington Grey and Bruce R. W. Co.*, 27 Chy. 95; 28 Chy. 327.

See, also, DEED IV., p. 204.

XIV. PROOF BY SECONDARY EVIDENCE.

1. *Lost Deeds.*

In ejectment it appeared that the lot in question had been granted in 1812, with other lots, to M. A. P., M., and P. In order to prove the alleged conveyance of the 13th February, 1816, by M. C. to W., which had been lost, the plaintiff put in a memorial thereof, registered December 19th, 1826, signed by the grantee, including an undivided moiety in all the land in the patent with other lands. It was shewn also that W., in 1827, had mortgaged all the lands in this memorial with other lands, to a bank, which, in 1829, reconveyed them to the trustees under W.'s will: that in 1833, R. took a conveyance from the devisee of W. of three of the lots mentioned in the memorial, not including the lot in question; and that in 1834, proceedings were taken in partition on the petition of the devisee of W., under which this lot was assigned to W. Possession had been held of this lot, not in accordance with the alleged lost deed, but by persons claiming under R.; but the court held that the evidence failed to prove such possession for forty years, or that it was taken with the knowledge of W. or his devisee. The plaintiff claimed under a deed from such devisee executed in 1873:—Held, *Cameron, J.*, dissenting, (1) That there was sufficient proof of the lost deed from M.C. (2) That the plaintiffs claiming under W. were protected under C. S. U. C. c. 88, s. 3, as against the possession of R., his co-tenant, for less than forty years. *Van Velsor et al. v. Hughson*, 45 Q.B. 252. Affirmed in appeal, see 20 C. L. J. 11.

2. *Other Cases.*

In an action for calls on stock where shares held by a defendant as executrix and in her own right were transferred under powers of attorney which were not produced:—Held, that there was sufficient evidence to shew the existence of such powers, and to let in secondary evidence thereof, the defendant and the testator having fully admitted their liability as owners of the shares. *Provincial Ins. Co. v. Cameron*, 31 C.P. 523.

Where a sale of lands for taxes had taken place, and a suit was subsequently instituted by the purchaser to set aside a conveyance to the defendant executed after the registration of his own deed and the defendant impeached the deed executed in pursuance of such sale, it was shewn that a warrant had been at one time in the court house, a portion of which was destroyed by fire, and that on that occasion the warrant had been probably consumed:—Held, sufficient evidence to authorise the court in admitting secondary evidence of its contents. *Ferguson v. Freeman*, 27 Chy. 211.

A cheque of the plaintiff's, when produced at the hearing, had written on it, "in full of all his (the defendant's) claims for notes or otherwise," and which words the plaintiff swore were on the cheque when sent to the defendant, which he denied, however. Four crosses were on the face of the cheque, and some initial letters in the margin, and these the plaintiff stated were the initials of a clerk in the bank, whom he had re-

quested to initial the words so introduced: The Court (Spragge, C.) refused to receive this as evidence of a receipt in full, in the absence of the bank clerk, who should have been called as a witness. *Livingston v. Wood*, 27 Chy. 515.

XV. PROOF AFTER NOTICE TO PRODUCE.

See *Ockley et al. v. Masson et al.* 6 O. R. 108, p. 243.

XVI. PROOF BY ENTRIES.

A loan and savings society appointed G. their treasurer; and the plaintiffs and defendant by two separate bonds became sureties for the due discharge of the duties of such officer. G. made default in his office, and a suit was instituted by the society against all the sureties, which was compromised by the plaintiffs paying about one-half of the sum claimed by the society:—Held, that in such a case the entries of G. in the books of the society were not evidence against the sureties during the lifetime of G. *Murray v. Gibson*, 28 Chy. 12.

The cases deciding that entries in the books of an officer are evidence in his lifetime against sureties questioned. See *Victoria Mutual Fire Ins. Co. v. Davidson, et al.*, 3 O. R., C. P. D. 378.

In an action against sureties for a town collector for his default in paying over the sum collected by him:—Held, that entries made by the collector on his roll, in the discharge of the duties of his office, of taxes paid to him were evidence against the sureties. *The Corporation of the Town of Welland v. Brown*, 4 O. R., C. P. D. 217.

After the occurrence of the accident which caused the destruction of the plaintiffs lumber, B. an engine-driver of the defendants, and who was in charge of the locomotive (No. 5) on the day the fire occurred, made an entry in what was termed the repairs book, kept in the defendants' shops: "Bottom rim of bonnet in stack wants making tight * * Screen wanted in front of ash pan." At the trial B. was called as a witness on the part of the plaintiff, and proved his having made such entry in the usual course of his duties. Per Spragge, C. J. O., and Hagarty, C. J., such entry was properly produced and read to the jury. Per Burton and Patterson, JJ.A., such entry or report was merely a narrative of a past occurrence, or something in the opinion of B. requiring attention, and in any view could only be receivable as evidence against the company, if at all, upon proof of B.'s death. *The Canada Central R. W. Co. v. McLaren*, 8 A. R. 564.

Two partners in business (T. & R. O'Neill) executed two mortgages in favour of J. W. W., assigned the mortgages to H., by way of derivative mortgage, on the 21st March, 1877. In January, 1877, the O'Neills became insolvent, and the plaintiff, their assignee, filed a bill to redeem these mortgages. After decree W. became insolvent, and the suit was revived in the name of P. & P., his assignees, in his stead. On the reference, H., claimed so much of the amount due on the original mortgages as would satisfy his derivative mortgage, and P. claimed the remainder. Against their

claims the plaintiff filed two similar surcharges, one against H., and the other against P. & P. In support of his surcharges the plaintiff offered the following evidence: 1 the books of the firm of T. & R. O'Neill; 2. the books of W.:—Held, that the books of T. & R. O'Neill, could not be used against either W.'s assignees or H. That the entries in the books of W. were evidence as admissions against his assignees, and as to transactions before the 21st March, 1877, against H., to shew the state of the account at the date of the assignment. *Court v. Holland—Ex parte Holland and Walsh*, 8 P. R. 219.—Taylor, Master.

XVII. EVIDENCE OF REPUTATION.

The locality and extent of a square being in question. Semble, that this being a matter of a quasi public nature in which a class of the people in the neighbourhood would be concerned, evidence of reputation was admissible; and under the circumstances set out in the report, it was Held that the square was sufficiently defined by such evidence. *VanKoughnet v. Denison*, 1 O.R., Chy. D. 349.

XVIII. PRODUCTION AND ADMISSION OF EVIDENCE.

1. Onus Probandi.

When defendants in a redemption suit on proving their claim in the master's office produced their mortgages and filed an affidavit verifying their claims, and stating that \$20,309.88 was due them for moneys advanced by them to the mortgagor and secured by the said mortgages:—Held, that their claim was *prima facie* proven, and the onus of reducing the amount rested with the plaintiff. *Court v. Holland—Ex parte Doran*, 8 P. R. 213. Taylor, Master.—Blake.

The plaintiffs held a mortgage made by the defendant, who covenanted to pay the mortgage money and interest. Defendant conveyed his equity of redemption to A., who subsequently released to the plaintiffs for a nominal consideration, after striving for a substantial one. The defendant, as part of the arrangement, gave the plaintiffs his note for some interest. The plaintiffs having sued on the covenant for payment, the jury were directed that if the release and note were taken by the plaintiffs in satisfaction of the liability on the covenant, to find for the defendant; if taken under a stipulation that it should not have that effect, to find for the plaintiffs; and that in the absence of evidence upon these points the inference would be that it was taken in satisfaction of plaintiffs' claim, the charge being thereby merged. The jury found for the defendant:—Held, that there was no misdirection, the onus of proving that there is no merger being upon the plaintiff in such a case; and the verdict was sustained. *North of Scotland Mortgage Co. v. Udell*, 46 Q. B. 511.

In actions against solicitors for negligence. See *O'Donohoe v. Whitty*, 2 O. R. 424, p. 39. *Re Kerr—Akers and Bull*, 29 Chy. 188, p. 40.

Semble, that R. S. O. c. 109 s. 2 is retrospective so as to cast the onus of disproving the payment of the consideration on the party impeach-

ing a conveyance as voluntary, even though the transaction took place prior to that enactment. *Sanders v. Malsburg*, 1 O. R., Chy. D. 178.

The power of a municipal council to close up a road under section 504 of the Municipal Act, whereby any one is excluded from access to his lands, is a conditional one only, and if another convenient road is not already in existence, or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed. The onus of shewing that another convenient road is open to the applicant is upon the corporation. *Adams and The Corporation of the Township of East Whitby*, 2 O. R., Q. B. D. 473.

Where the defendant, being sued on a promissory note, alleged that the said note was not duly stamped before the repeal of the Stamp Act, nor until after action brought, although he had communicated the fact of that omission to the plaintiffs before he was sued, and the plaintiffs denied that the defendant had so notified them, and alleged that they double-stamped the note as soon as they had knowledge of the omission to stamp, which was not till after the action brought, and after the repeal of the Stamp Act; and the evidence shewed that when the note came to the plaintiffs' hands it appeared to be properly stamped: Held, that the defendant could not be allowed, upon his own unsupported testimony, in such a case, to escape liability. The onus was on him to establish that the stamp was not duly affixed, and that the omission to duly stamp was so intelligibly communicated to the plaintiffs that it could be said they acquired the knowledge of the defect at the time alleged by him. *Bank of Ottawa v. McMorrow*, 4 O. R., Chy. D. 345.

Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago on margin, which the latter did, advancing them money, for which they sued. Defendants having refused to settle for losses sustained:—Held, reversing the judgment of Patterson, J.A., that, assuming the State law to be that if the contract was to deal in such a way that only the differences in prices should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, the contract would be a gambling contract and illegal, it lay upon defendants to establish clearly that such was the character of the dealing and this defence not having been clearly proved, judgment was given for the plaintiffs. *Rice et al. v. Gunn et al.*, 4 O. R., Q. B. D. 579.

As to proving malice in an action of slander against a public officer. See *Dewe v. Waterbury*, 6 S. C. R. 143, p. 206.

In a "débats de comptes" between A.G. (appellant) in his quality of tutor to M. L. H. C. R., a minor, and Dame H. P. (respondent), universal legatee of her late husband L. R., who had had possession of the minor's property (his grandchild) as tutor, the following items, viz., \$5,466.63 (for stock of goods sold by L. R. to his son) and \$451.07, and \$90.76, for "cash received at the counter," charged by the respondent in her account, were contested. In 1871, L. L. R. the minor's father, married one M. C. G., and by contract of marriage obtained from his father, L. R., two immovable properties, en avancement

d'hoirie. At the same time L. R., the father, retired from business and left to L. L. R., his son, the whole of his stock in trade, which was valued at \$5,466.63, making an inventory thereof. L. L. R. died in 1872 leaving one child, said M. L. H. C. R., and L. R., her grandfather, was appointed her tutor. There was no evidence that the stock in trade had been sold by the father and purchased by the son, or that the father gave it to his son. However, when L. R., in his capacity of tutor to his grandchild, made an inventory of his son's succession, he charged his son with this amount of \$5,466.63:—Held (reversing the judgment of the court below), that it was for the respondent to prove that there had been a sale of the stock in trade by L. R. to his son L. L. R., the minor's father, and that there being no evidence of such a sale the respondent could not legally charge the minor with that amount. As to the other two items, these were granted to the respondent by the Court of Queen's Bench on the ground that, although they had been entered as cash received at the counter, there was evidence that they had been already entered in the ledger. The only evidence to support this fact was the affidavit of one Hebert, the bookkeeper of L. R. filed with the reddition de comptes before notary, prior to the institution of this action:—Held, reversing the judgment of the court below, that the affidavit of Hebert was inadmissible evidence, and therefore these two items could not be charged against the minor. *Gagnon v. Prince*, 7 S. C. R. 386. Special leave to appeal to Her Majesty in Council in this case was refused. See S. C., 8 App. Cas. 103.

See *Regina v. Fee*, 3 O. R. 107, p. 243; *Morton v. Nihan*, 5 A. R. 20, p. 63; *Vinden v. Fraser*, 28 Chy. 502 p. 304; *Burke v. Taylor*, 46 Q. B. 371, p. 282; *Johnston v. Christie*, 31 C. P. 358.

2. Relevancy.

In an action against a railway company for loss occasioned by fire alleged to have arisen from one of their engines (No. 5), with a view of shewing that the engine was defectively constructed, evidence was given that on previous occasions when it was in the same or an improved condition, it had thrown out sparks causing fires. Per Spragge, C. J. O., and Hagarty, C. J., such evidence was properly receivable. *The Canada Central R. W. Co. v. McLaren*, 8 A. R. 564.

3. Other Cases.

A former suit had been instituted by the plaintiff which had been dismissed, as the plaintiff had not acquired the legal estate until after the bill was filed:—Held, that under such circumstances the question was not *res judicata*, and (2) that the evidence taken in the former suit and the examination of defendant by the plaintiff therein were admissible in the present one, the issue being practically the same. *Adamson v. Adamson*, 28 Chy. 221.

As to a note insufficiently stamped being admissible as evidence of a debt. See *Caughill v. Clarke*, 3 O. R. 269, p. 74.

Where the right of a company to use a traction engine on certain highways under an agreement with a municipal corporation was disputed:—

Held, that the fact that the company for several years after the said agreement used horse power only, was not to be overlooked as evidencing the true agreement of the parties. *The Corporation of the County of York v. The Toronto Gravel Road and Concrete Co.*, 3 O. R., Chy. D. 584.

Overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly, made "without prejudice," are inadmissible in evidence on grounds of public policy, although the pendency of such negotiations as a matter of fact may be looked at. *Id.*

As to admissibility of solicitors' correspondence and requisitions of title in an action for specific performance. See *McClung v. McCracken, et al.*, 3 O. R. 596.

XIX. CONTRADICTORY EVIDENCE.

One C. entered into agreements with several parties to carry freights for them at certain named prices to be paid to the defendant—not mentioning any particular vessels in which the same were to be carried—and then agreed with the defendant, as part owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon. The defendant and C. both swore that the arrangement had not been made by C. as agent of the defendant, but for his own benefit:—Held, that the fact of the defendant having rendered an account in his own name and also sued for a portion of the freight, though aided by the other circumstances mentioned in the judgment, was not sufficient to countervail the positive denials of the defendant and C., that the contracts had not been made in behalf of and as agent for the defendant, freight being *prima facie* payable to the master of a vessel, and the cargo need not be delivered by him until the freight thereof is paid; although in any other transaction such conduct would have been strong evidence that the defendant was the principal contractor. *Merchants' Bank v. Graham*, 27 Chy. 524.

See also *Mitchell v. Strathy*, 28 Chy. 80.

XX. CORROBORATIVE EVIDENCE.

K. had assigned the moneys due to him by S.:—Held, that K., who was a witness, was not "an opposite or interested party to the suit," within the meaning of the Evidence Act, R. S. O. c. 62, s. 10, and his evidence therefore did not require corroboration as against the executors of S. *Watson v. Severn et al.*, 6 A. R. 559.

Held, that under sec. 10 of the Evidence Act, R. S. O. c. 62, any evidence adduced by a party interested against an executrix corroborating the evidence of the interested party in any particular, must be submitted to the jury, as sufficient in point of law, the weight to be attached to it in point of fact being a matter for their consideration. *Orr v. Orr*, 21 Chy. 397, and *McDonald v. McKinnon*, 26 Chy. 12, commented upon. *Parker v. Parker*, 32 C. P. 113.

In this case, which was an action on the common counts against the defendant as executrix, &c., for money paid to the use of the defendant's testator, the transaction arose out of some pro-

missory notes made by the testator and the plaintiff, but which the plaintiff alleged he signed for the testator's accommodation, and had subsequently paid for the testator:—Held, on the evidence, set out in the report, that the plaintiff's evidence was sufficiently corroborated within the meaning of the Act: and that the count for money paid was supported. *Ib.*

The widow of the intestate claimed against his estate a sum of \$700, which she alleged he had borrowed from her after her marriage, and about ten years before his death, for the purpose of buying a stock in trade. The money was deposited in a bank at the time of the marriage, which took place before the C. S. U. C. c. 73. Evidence was given in corroboration of the claimant to the effect that—"He (Laws) told me he had got \$600 or \$700 from his wife. She had got a little money. He said he had paid that money for the things he had in the store. This was after he had bought L. out. * * He said his wife had helped him to \$600 or \$700. * * I understood he had used the money to buy out the business:—Held, affirming the order of the chancellor, reversing the finding of the master at Hamilton, that she could not recover. Per Spragge, C., and Blake, V. C. The evidence of the widow was not sufficiently corroborated. Per Proudfoot, V. C. The evidence that she chose in action was originally hers, and that she gave it to her husband, was corroborated, and this corroboration was sufficient to support her own evidence that it was a loan; but the C. S. U. C. c. 73, gave her the right to assert her proprietorship as against her husband, and as incident thereto the right to bring a suit against him; to which proceedings however the Statute of Limitations was a bar, and therefore her remedy was gone. *Re Laws—Laws v. Laws*, 28 Chy. 382.

The testator, father of the plaintiff's wife, suggested to him to purchase a lot of land which was subject to a mortgage, saying that if he would do so, and have the property conveyed to his (plaintiff's) wife, he would pay off the incumbrance. The plaintiff in consequence made the purchase, and had the property conveyed as suggested, but the testator refused to pay the instalments on the mortgage and the plaintiff was compelled to pay it himself. The testator subsequently expressed his regret at having thus acted, and promised the plaintiff that he would do better for them; that he would pay plaintiff \$150 a year for ten years, and bequeath to his wife \$1,000. By the will, however, only \$100 was left to her, and the plaintiff instituted the present suit against the representative of his father-in-law to enforce such second agreement, or for payment of damages by reason of the breach thereof. The only direct evidence was that of the plaintiff. At the hearing there were produced two receipts signed by the daughter for \$260 and \$200, respectively, expressed to be on account of money left her by her father's will; and witnesses swore that the testator had told them that he had agreed to pay for the place if the plaintiff would take out the deed in his wife's name, and that he was making the payments as the plaintiff had so taken the deed:—Held, that there was sufficient corroboration of the evidence of the plaintiff as required by the statute (R. S. O. c. 62). *Halleran v. Moon*, 28 Chy. 319.

When each item in an account against the estate of a deceased person is an independent transaction, and constitutes a separate and independent cause of action, to satisfy the statute R. S. O. c. 62, s. 10, some essential corroboration of the interested party's evidence must be adduced as to each item. *Cook v. Grant*, 32 C. P. 511; *Re Ross*, 29 Chy. 385.

The plaintiff claimed to recover against the defendant as administrator of his deceased brother, W. G., two sums, one of \$800, which she alleged W. G. received for her from another brother, S. G., also deceased; and the other of \$1,500, which she alleged W. G. promised to leave her in consideration of her remaining with him, taking care of and managing his house, as long as he lived. As to the \$800, the plaintiff's evidence was held to be sufficiently corroborated by the evidence, set out in the report, within the meaning of the statute, but otherwise as to the \$1,500. *Cook v. Grant*, 32 C. P. 511.

See *McKay v. McKay*, 31 C.P. 1, p. 183; *Morton v. Nihan*, 5 A.R. 20 p. 63. See also *Re Murray—Purdom v. Murray*, 29 Chy. 443; *Watson v. Bradshaw et al.*, 6 A. R. 666.

XXI. EXPERT EVIDENCE.

The parties desired the assistance of scientific evidence as to the height of the defendant's dam and the effect of raising it. The court (Proudfoot, J.) appointed an engineer to inspect and report thereon, reserving the costs until his report should be obtained. *Hawkins v. Mahaffy*, 29 Chy. 326.

Remarks upon the impropriety of receiving the opinions of surveyors as experts as to the proper mode of making a survey under a Statute. See *Corporation of Stafford v. Bell*, 6 A. R. 273.

Where the opinions of experts on foreign law are conflicting, the Court will examine for itself the decisions and text books of the foreign country, in order to arrive at a satisfactory conclusion. *Rice et al. v. Gunn, et al.*, 4 O. R., Q. B. D. 579.

As to costs incurred for expenses of surveys and other special work of that nature in order to qualify surveyors to give evidence. See *McGannon v. Clarke*, 9 P. R. 555.

See also *Moser v. Snarr*. 45 Q. B. 428.

EXAMINATION OF JUDGMENT DEBTORS.

TO ATTACH DEBTS—See ATTACHMENT OF DEBTS.

EXCHEQUER COURT.

See PETITION OF RIGHT.

Semble, per Strong, J., there is nothing in sec. 63 of the Supreme and Exchequer Court Act confining appeals from the Exchequer Court to a recourse against final judgments only, the word used being "decision," which is applicable as well to rules and orders not final as to final decisions. *Danjou v. Marquis*, 3 S. C. R. 251.

Application for security for costs. See *Wood v. The Queen*, 7 S. C. R. 631, p. 155.

EXECUTION.

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- XIII. INTERPLEADER PROCEEDINGS—See *INTERPLEADER*.
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- XV. SHERIFF'S DUTY AND LIABILITY—See *SHERIFF*.
- XVI. POUNDAGE—See *SHERIFF*.

I. IMMEDIATE EXECUTION.

Where it appears the defendant has no defence, and has made, or is intending to make a fraudulent disposition of his property, or is so dealing with it as to embarrass the plaintiff in reaching it by execution, the court will, on motion, under rule 324, upon a proper case being made, order judgment and immediate execution. In the event of other executions being obtained against the debtor's property before the time at which the plaintiff would be entitled to issue executions as on a judgment in default of appearance, and the amount realized being insufficient to satisfy all parties, a ratable division should be made. *Kinloch v. Morton*, 9 P. R. 38.—Osler.

II. TIME OF ISSUING.

An execution issued on the same day that a judgment on default of appearance, contrary to Order 9, Rule 4, is signed, is an irregularity only, and not a nullity. *Macdonald, et al. v. Crombie, et al*, 2 O. R., Q. B. D. 243.

As to the time of issuing execution against Mutual Insurance Companies. See *Lowson v. Canada Farmer's Mutual Ins. Co.*, 8 A. R. 613.
Jett v. Anderson, 8 R.R. 397, p. 640

III. FIERI FACIAS (GOODS).

1. *What amounts to a Seizure.*

As to what constitutes a valid seizure under a condition in a policy of insurance providing that if the insured property should be levied upon or taken into possession or custody under any legal process the policy should cease to be binding. See *May v. The Standard Fire Ins. Co.*, 5 A. R. 605.

2. *Time of Operation.*

A sheriff received two executions against one M.'s goods, on the 18th January, and 15th February, respectively. He made a formal seizure on the delivery of the first writ, but left no one in possession, and the execution debtor remained in possession, and carried on his business as before the seizure. There had been a stay on this writ by the solicitor for the execution creditor, but on the delivery of the second writ the sheriff was directed to proceed on both. On the 6th March, the goods, consisting of the whole of the execution debtor's stock in trade, were sold by the execution debtor to the plaintiffs, who removed them to their own place of business. On 22nd March, the sheriff seized all the goods then in the plaintiffs' possession, which he had received from the execution debtor, as also certain goods of the plaintiffs which he claimed to take in lieu of goods received from the execution debtor and sold by plaintiffs. The sale to the plaintiffs was found to be bona fide, and for value, and without notice of the executions. In replevin for the goods:—Held, Wilson, C. J., dissenting, that the sheriff was entitled to the goods of the execution debtor then in plaintiffs' possession; but not to the goods taken by the sheriff in lieu of those sold by the plaintiffs: that there was no abandonment of the executions, nor any such conduct on the part of the sheriff or the execution creditor as to estop them from asserting that the executions were in force. On the sheriff making his seizure on the 22nd March, the plaintiff gave him an undertaking to answer for all goods sold by him thereafter, if the sheriff should be held entitled to the goods:—Held under a counter-claim setting up this undertaking the sheriff was entitled to recover the value of the goods sold by the plaintiffs after the 22nd March, and before the issue of the writ of replevin. *Patterson et al v. McKellar*, 4 O. R., C. P. D. 407.

3. *Property liable to Seizure.*

See *Oliver v. Newhouse*, 32 C. P. 90; 8 A. R. 122.

IV. FIERI FACIAS (LANDS.)

1. *Property liable to Seizure.*

Execution against husband and wife.—Separate Estate.—Tenancy by entireties. See *Griffin v. Patterson et ux*, 45 Q. B. 536.

Four persons joined in executing a mortgage of their joint estate, and subsequently the interest of three of them was sold under executions at law:—Held, that the sale was inoperative; that the owner of the equity of redemption

tion had a right to redeem; and that the purchaser at the sheriff's sale, who was also the mortgagee, having gone into possession of the mortgage estate, was bound to account for the rents and profits. *Crown v. Chamberlin*, 27 Chy. 551. See *Wood v. Hank*, 28 Chy. 146, p. 745.

Where R. assigned a mortgage to M. to secure payment of two notes of less amount than the mortgage debt, and M. having procured an assignment to himself of a judgment against R., the sheriff, pursuant to writs issued under the said judgment, seized the mortgage so assigned, and M. refused to execute a re-assignment thereof to R., until not only the amount due on the notes, but also the balance due under the mortgage was paid:—Held, that R. was entitled to a re-assignment on payment of what was due on the notes only, for the plaintiff's interest in the mortgage was not properly exigible by the sheriff under R. S. O. c. 66. *Ross v. Simpson*, 23 Chy. 552, distinguished. *Rumohr v. Marx*, 3 O. R., Chy. D. 167.

V. SALE OF LAND UNDER EXECUTION.

P. created three several mortgages on separate portions of his estate, in all about 140 acres, estimated as worth \$6,000, subject to incumbrances amounting to \$3,500 and interest. One of the mortgages was in favour of the defendant M., who subsequently acquired the interests of the other two mortgagees. After the creation of these mortgages, P. executed a deed of trust of the whole property in order to defeat a claim of title set up to 10 acres by one S. Default was made in payment of M.'s mortgage, who instituted proceedings at law and recovered judgment, on which he sued out execution and under it the sheriff (after the defendant M. had so acquired the other mortgages) proceeded to a sale of the property, which he offered in three distinct parcels, and M. bid for and became the purchaser of all at sums amounting in the whole to \$20. The cestuis que trust thereupon filed a bill to redeem, alleging that the sale to M. had been at a gross undervalue, and praying to have the same set aside, the court, however, refused the relief asked with costs, being of opinion that the deed of trust was fraudulent, and that the price realized was large, considering that it was a sheriff's sale. *Parr v. Montgomery*, 27 Chy. 521.

The land of a testator or intestate is liable to be sold only for his debt, and where it is shewn that the judgment was not in fact recovered in respect of such a debt, but that the execution creditors never were creditors of the deceased, a sale of the land under it cannot be supported. *Freed v. Orr et al.*, 6 A. R. 690.

VI. VENDITIONI EXPOSAS.

Sheriff's sale under ven. ex. Procès verbal, what it should contain. Art. 638, C. C. P. See *Montreal Loan and Mortgage Co. v. Fauteux et al.*, 3 S. C. R. 411.

VII. EQUITABLE EXECUTION.

Plaintiff claimed a debt of \$200 from the defendant. Defendant did not appear to the writ. The only property the defendant owned was the equity of redemption in certain lands, on which there were two mortgages, one held by the plain-

tiff, the other outstanding in other hands. On application of plaintiff for judgment for \$200 and interest, and for a decree for sale of the equity of redemption:—Held, on the authority of *Karr v. Styles*, 26 Chy. 309, that the plaintiff could have judgment as asked, notwithstanding that in this case there were no fi. fas. in the sheriff's hands. *Johnson v. Bennett*, 9 P. R. 337.—Proudfoot.

VIII. RENEWING WRIT.

Writs of execution were issued on the 12th December, 1881, in Toronto, and forwarded to the sheriff of an outer county. On the 9th December, 1882, the plaintiff wrote to the sheriff to forward the writs for renewal, and on the 11th December telegraphed him to the like effect. On the same day the plaintiff filed a præcipe requiring the renewal. The writs were received on the 12th December. On an application for an order for leave to renew nunc pro tunc it was held that the delay was not the fault of the sheriff or other officer of the court, and that there was no power to make the amendment. *Louison v. Canada Farmers Mutual Ins. Co.* 9 P. R. 309.—Dalton, Master.

IX. ABANDONMENT.

See *Patterson, et al. v. McKellar*, 4 O. R. 407, p. 264.

X. PRIORITY OF EXECUTIONS.

The common law right as to the priority of an execution creditor of a lunatic, who has an execution in the hands of the sheriff before the lunatic has been declared such, will not be interfered with by injunction restraining him from realizing under his writ. *In re Grant*, 28 Chy. 457.

XI. SETTING ASIDE EXECUTION.

The plaintiff filed his bill on the 14th March, 1874. On the 31st, an attachment in insolvency was issued by defendant against plaintiff. The plaintiff's bill was dismissed, with costs, in October, 1874. Defendant proved against the estate for the costs of the suit, but did not take his dividend, and took no further steps to recover his claim until after the order for discharge of plaintiff (25th May, 1877), when he issued execution. On the application of the plaintiff, Sprague, C., refused to set aside the execution, holding that defendant was entitled to issue it, and that the proving against the estate for the costs when it was not legally provable, did not operate as an estoppel in pais. *Stevenson v. Sexsmith*, 8 P. R. 286.

EXECUTORS AND ADMINISTRATORS.

I. PROBATE AND LETTERS OF ADMINISTRATION, 267.

II. RIGHTS, AUTHORITY, AND DUTY.

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2. Debts due to them by the Testator, 268.
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4. *As Trustees*—See TRUSTS AND TRUSTEES.

III. LIABILITIES.

1. *For Acts of each other*, 269.
2. *For Interest*, 270.
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IV. PARTIES TO SUITS—See PLEADING.

V. ACTIONS AND PROCEEDINGS AGAINST, 270.

VI. EVIDENCE UNDER R. S. O. c. 62, s. 10— See EVIDENCE.

VII. DEFICIENCY OF ASSETS, 271.

VIII. LANDS AS ASSETS, 271.

IX. EXECUTOR DE SON TORT, 271.

X. ADMINISTRATION SUITS.

1. *Application for*, 271.
2. *Pleading and Practice*, 272.
3. *Costs and Commission*, 273.
4. *Administration ad litem*, 275.

I. PROBATE AND LETTERS OF ADMINISTRATION.

One D. dying domiciled abroad, R., a creditor of her estate, obtained letters of administration there. Subsequently S., as appointee of R., and with his consent, applied here for letters of administration to be granted to him by the Surrogate Court. E., however, residing at Toronto, and as next of kin to B., also applied here for administration to B.'s estate. S. now applied to have the matter transferred into this Court, or for a writ of prohibition to the Surrogate Judge preventing him granting letters to E., and a mandamus ordering him to grant them to S:—Held, failing any proof as to the law in Maine, it must be assumed to agree with the law here, according to which the court will not grant administration to a creditor, so long as one having a better claim, as is the case with the next of kin, is willing to act; and, inasmuch as the next of kin did not appear to have been cited before the court in Maine, the status of the creditor who obtained administration there, or of his appointee, was not such as to compel the Surrogate Judge here to pass over the next of kin. The appointment of a creditor as administrator is not as of right, but rests in the discretion of the Judge who appoints, and that cannot be interfered with by any peremptory writ; and R. S. O. c. 46, ss. 32, 36 do not better the claim of a creditor. *Browne v. Phillips*, Ambl. 416, followed. *Re Hill*, L. R. 2 P. & D. 89, distinguished.—*Re O'Brien*, 3 O. R., Chy. D. 326.

II. RIGHTS, AUTHORITY, AND DUTY.

1. Remuneration.

Where there is a bequest of a share of the residuary estate to executors it is not to be inferred that the bequest was given in lieu of compensation, as in the case of a legacy of a definite sum, but it is nevertheless one of the elements to be considered in dealing with the question of compensation:—Held, that in this case, the executors were entitled to compensation, notwithstanding

standing a bequest to them of a share of the residue, because the amount of the residue was, when the will was made and after the testator's death, a matter of extreme uncertainty; nevertheless, no percentages should be allowed on the share of the residue, which the executors took under the residuary clause in the will. *Boys' Home of the City of Hamilton v. Lewis et al.*, 4 O. R., Chy. D. 18.

The fact that, an account being taken in the master's office pursuant to a decree in an administration suit, a balance has been found against an executor, some of the items of which are the result of a surcharge, is not alone sufficient to disentitle him to compensation under R. S. O. c. 107, s. 41. *Steeuwright et al v. Leys*, 1 O. R., Chy. D. 375.

See also Sub-head X. s. 3, p. 273.

2. Debts due to them by the Testator.

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full; and as against an executor claiming as creditor, any other creditor may set up the Statute of Limitations. *Re Ross*, 29 Chy. 385.

3. Other Cases.

About 1837 Andrew McMinn devised his lands to his wife, Mary McMinn, for life, with remainder to Maria Kearney. Letters of administration with the will annexed were granted to the widow. At the time of the testator's death the lands were mortgaged for £150. A suit to foreclose this mortgage was instituted after the testator's death, and it was alleged that under it a foreclosure was obtained, and the property sold, and purchased by the administratrix for £905. There was evidence that the administratrix received personal assets of the testator sufficient to pay off the mortgage, had she chosen so to apply them. The sum of £725 was lent to the administratrix by Ann Kean, her daughter by a former marriage. The administratrix then sold the property to the public authorities for £1,750, out of which she paid her daughter £400. From 1858 the daughter, with the leave of the administratrix, occupied about one-quarter of an acre of the land, until, in 1873, under the authority of an expropriation Act, she was ejected from it, the commissioner taking in all three acres and three tenths of this property, the balance being in the occupation of Maria Kearney and her husband, Francis Kearney (the appellants.) These three acres and three tenths were appraised at \$2,310, and that sum was paid into court to abide a decision as to the legal or equitable rights of the parties respectively. Ann Kean claimed a title to the whole of the land taken, under an alleged parol agreement with her mother, that she should have the land in satisfaction of £325, the residue unpaid of the loan of £725, and obtained a rule nisi for the payment to her of the sum of \$2,310, the amount awarded as compensation for the land. In May, 1872, the administratrix executed an informal instrument under seal, purporting to be a lease of her life estate to the appellants in the whole property, reserving a rental of \$80 a year and liberty to occupy two rooms in a dwelling house then occupied by her. On a motion to make this rule absolute, several affi-

davits were filed, including those of the appellants. On the 18th January, 1875, the matter was referred to a master, to take evidence and report thereon, subject to such report being modified by the court or a judge. The master reported that the appellants had the sole legal and equitable rights in the property. On motion to confirm that report, the court made an order apportioning the \$2,310 between Ann Kean and the appellants, the former being declared entitled to be paid \$1,015.61, and the latter, on filing the written consent of Mrs. McMinn, the residue of the \$2,310:—Held, on appeal, that the administratrix, having personal assets of the testator sufficient to discharge the mortgage, was bound in the due course of her administration to discharge said incumbrance, and that the parol agreement made by her with her daughter was null and void. *Kearney v. Kean*, 3 S. C. R. 332.

Where a testator devised to his wife for life a parcel of land "with the power of sale at any time during her life subject to the consent of my executors." Three executors were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving executors was not sufficient:—Held, that in the conflicting state of the authorities upon the question the title was not one which the court could force upon a purchaser. *Re McNabb*, 1 O. R., Chy. D. 94.

III. LIABILITIES.

1 For Acts of each other.

J. B., sr., and S. D., of Montreal, had been executors of C. B., who died in Montreal about 1844. S. D. proved the will in Ontario. The plaintiffs (two infants) were solely entitled under this will. J. B., sr., died in Montreal in 1869. T. B. and J. B., jr., were his executors, and both proved the will in Ontario, but T. B. alone acted as executor, J. B., jr., having given him a power of attorney to act for him in all matters relating to the estate. The plaintiffs and T. B. and J. B., jr., were each entitled to a one-third share under the will of J. B., sr. A suit was brought for the administration of both estates, and a receiver appointed. In taking the accounts before the master S. D.'s attendance was dispensed with, as it appeared that none of the assets of C. B.'s estate in Ontario had come to his hands. The master found T. B. and J. B., jr., who did not appear or file any accounts, indebted to the estates in about \$51,000. In default of evidence to shew that any of the assets come to their hands formed part of C. B.'s estate, the master further found that the whole formed part of J. B., sr.'s, estate. The decree ordered the executors to distinguish the assets of each estate, and notified them that in default the whole would be taken to belong to the estate of J. B., sr. T. B. having died, the suit was revived. J. B., jr., applied to the court for leave to open and retake the accounts, on the ground that he had been kept in ignorance of the proceedings by his co-executors. Leave was given him to surcharge and falsify. J. B., jr., now distinguished the assets of the two estates, and sought to be relieved from liability as to the estate of C. B., on the ground that he was not executor of that estate: as to the J. B., sr.,

estate, he also sought to be relieved in several respects. The Master's judgment is upon these points:—Held, that T. B., and J. B., jr., did not, by proving the will of J. B., sr., become executors of C. B., as J. B., sr., was not the sole or surviving executor of C. B.; Held, that J. B., jr., was liable for the moneys of J. B., sr.'s, estate, come to the hands of Thomas, whether before or after the proving of the will, or before or after the power of attorney: Held, that the writ of attachment or registration issued in Quebec did not affect the assets in Ontario: Held, that as the Ontario Bank shares, though subscribed for at Montreal, and at one time registered there, were transferred to Bowmanville during the testator's life, and appeared in the stock register there only, they are Ontario assets. *Bloomfield v. Brooke*, 8 P. R. 266.—Taylor, Master.

H. & C. were appointed executors. H. took upon himself the actual management of the estate with the knowledge and consent of, but not under any express agreement with C. H. applied a sum of money to his own use, but of this C. was not aware. The will contained the usual indemnity clause exonerating each from liability for the other:—Held, that C. was not liable for the sum appropriated by H. *King v. Hilton*, 29 Chy. 381.

2 For Interest.

Held, that the executors, in this case, should be charged with interest upon the residue in their hands after the time when it was distributable and the annual rate of interest charged accordingly upon it from the time when it might properly have been distributed, or appropriated, down to the time of its actual payment, or if not yet paid down to the present time. *Boys' Home of the City of Hamilton v. Lewis et al.*, 4 O. R., Chy. D. 18.

See *McCardle v. Moore et al.*, 2 O. R. 229, p. 274.

V. ACTIONS AND PROCEEDINGS AGAINST.

The Referee in Chambers has no jurisdiction to make an order for payment into court by an executor or administrator of amounts admitted by him to be in his hands. *Re Curry—Wright v. Curry—Curry v. Curry*, 8 P. R. 340.—Stephens, Referee.

An agreement to make a will in favour of an adopted child may be enforced against the personal representatives of the obligor. See *Roberts v. Hall*, 1 O. R. 388.

The master has authority to take the account with rests, under the ordinary reference, as against an executor, but where he declines to charge the executor in this way, if it is intended to appeal, he should be required to report the facts to enable the court to determine on the propriety of his decision. Quære, whether it is not the more proper course to bring the matter up on further directions with all the materials for consideration spread out on the report, rather than to appeal in such a case. *Sievwright et al. v. Leys*, 1 O. R., Chy. D. 375.

G. having dissolved partnership with M., by the terms of the dissolution held certain land subject to a lien of \$525, to be paid by M. M.

then arranged a sale to C. for \$2,250, intending to defraud any company who would lend \$1,125, on the security of the land (it being really worth about \$600), and drew up a receipt for \$1,150, representing that sum as being part payment of the consideration money, which G. signed. G. subsequently executed a conveyance with \$2,250 inserted as the consideration, and deposited it with his solicitor as an escrow, to be delivered up on payment of his \$525 lien. It appeared G. had since died, and S. was appointed his administrator. M. and C. by means of an overvaluation and certain misrepresentations, one of which was the production of G.'s receipt, obtained a loan of \$1,125 from the plaintiffs to C., and out of the proceeds paid S. the \$525, and took up the deed. At the trial it was shewn that the plaintiffs were aware of the death of G. before they acted on or even knew of the existence of his receipt, and that S. knew nothing of the transaction except that he was entitled to the lien for \$525.—Held (reversing the judgment of Proudfoot, J.), that the plaintiffs could not recover against S. as representative of G., for no cause of action existed against G. at the time of his death, and S. had done no wrong. In the absence of fiduciary relationship no recovery can be had against the representatives of a deceased person who is charged with fraud unless profit has accrued to the wrongdoer's estate. *Hamilton Provident & Loan Society v. Cornell*, 4 O. R., Chy. D. 623.

See also *Davidson v. Oliver*, 29 Chy. 433.

VII. DEFICIENCY OF ASSETS.

The R. S. O. c. 107, s. 30, which enacts that on the administration of the estate of a deceased person, in case of a deficiency of assets, all debts shall be paid *pari passu*, not only abolishes privilege among creditors, but places them in the same position with respect to each other as legatees; and a creditor receiving payment in full, either in an action against the executor or by the voluntary act of the latter, must refund the excess above his proportionate share at the instance of other creditors. A secured creditor need not bring his security into hotchpot as a condition precedent to ranking on the estate, his lien being expressly preserved by the Act. *Chamberlen v. Clark et al.* 135. 1 O. R., Chy. D.; affirmed on appeal, 9 A. R. 273.

VIII. LANDS AS ASSETS.

The land of a testator or intestate is liable to be sold only for his debt, and where it is shewn that the judgment was not in fact recovered in respect of such a debt, but that the execution creditors never were creditors of the deceased, a sale of the land under it cannot be supported. *Freed v. Orr et al.*, 6 A. R. 690.

IX. EXECUTOR DE SON TORT.

See *Re Colton—Fisher v. Colton*, 8 P. R. 542, p. 272.

X. ADMINISTRATION SUITS.

1. Application for.

An administration order was granted by the master at Chatham under G. O. 638, while a suit

was pending for the construction of the will of the testator, in which administration was asked, and in which the executors were charged with misconduct, and before a year had elapsed since the death of the testator upon appeal proceedings before the master were stayed, and special directions given as to the administration as set forth in the order on appeal. *Heywood v. Sive-wright et al.*, 8 P. R. 79.—Sprague.

A creditor of an intestate served notice of motion for an administration order under G. O. 638, on D.'s widow and administratrix. The widow then served a similar notice upon the heirs of her husband, and filed affidavits alleging a deficiency of the personalty to pay debts: that creditors were suing, and also filed a consent of the adult heirs to an order in her favour. The master at Chatham granted an administration order to the widow, and, on appeal, Proudfoot, V. C., held that he was right. *Re Draggon—Draggon v. Draggon*; *Re Draggon—Abell v. Draggon*, 8 P. R. 330.

When a claim against a deceased's estate is one arising out of a contract of suretyship, the court will not, unless by consent of all parties, make an administration decree except on a bill filed. Semble, that administration of an estate will not be ordered by the court where no legal personal representative has been appointed or dispensed with, though an executrix *de son tort* is before the court. *Re Colton—Fisher v. Colton*, 8 P. R. 542.—Proudfoot.

An order may be obtained under the general orders for the administration of the personal estate of the testator by the personal representative of a legatee as well as by the legatee himself. *Simpson v. Horne*, 28 Chy. 1.

An administration of an estate in which infants were interested, was made on the mere suggestion of their next friend that it would be for their benefit, without going into the merits of the case between the plaintiff and the defendant, the executor. *Re Wilson—Lloyd v. Tichborne*, 9 P. R. 89.—Proudfoot.

An order for the administration of an estate of a deceased person was refused, on the ground that 12 months had not elapsed from the death of the deceased, no special circumstances being shewn. *Grant v. Grant*, 9 P. R. 211.—Boyd.

In an administration matter under G. O. Chy. 648-649, the plaintiff claimed to be a creditor of the estate, by reason of the support and maintenance by him of the testator's wife (in England) during the testator's lifetime:—Held, that the plaintiff's claim should be supported by *viva voce* evidence, and an action was directed to be entered. *Groom v. Darlington*, 9 P. R. 298.—Boyd.

2. Pleading and Practice.

Held, that the jurisdiction of local masters in administration suits, under G. O. Chy. 638, is not interfered with by Rule 422, O. J. Act, the practice in such matters is preserved intact by Rule 3, O. J. Act. In such matters there is power to direct service to be made out of the jurisdiction. *Re Allan—Pocock v. Allan*, 9 P. R. 277.—Full Court.

The plaintiff was an executor as well as a creditor, and was charged with wilful default:—Held, that enquiry as to such default could be made under the order of reference (Form No. 171, O. J. Act. 1*b*).

The principal and surety being here the plaintiff and defendant respectively, *Re Collins*, 8 P. R. 543, which decides that in a case of principal and surety a summary application to administer under G. O. Chy. 638 is improper, was held not to apply. *Ib*.

An application to consolidate two motions for administration and partition pending before a local master should be made to him and not to a judge in Chambers. *Lambier v. Lambier*, 9 P. R. 422.—*Boyd*.

Under an administration order granted by a local master pursuant to G. O. Chy. 638, he may investigate questions of wilful default, and misconduct, and if he refuses, the plaintiff should appeal. If an action is commenced the extra costs must be borne by the plaintiff. When the misconduct is such as would entitle a plaintiff at the outset to apply for an injunction or a receiver, an action should be brought. *Sullivan v. Hartly*, 9 P. R. 500.—*Boyd*.

Parties to suit. See *Webster, et al. v. Leys, et al.*, 28 Chy. 471; *Hughes v. Hughes*, 6 A. R. 373; *Siewwright v. Leys*, 28 Chy. 498.

See, also, *Re Ross*, 5 A. R. 82, 8 P. R. 86; *Hopper v. Harrison*, 28 Chy. 22; *Gaughan v. Sharpe*, 6 A. R. 417.

3. Costs and Commission.

Where in an administration suit property sold subject to a mortgage:—Held, that the commission in lieu of costs should be upon the amount realized by the sale—that is, upon the actual value of the interest of the intestate in the property in question, not upon the whole purchase money. *Re McColl—McColl v. McColl*, 8 P. R. 480.—*Blake*.

Where one of several persons beneficially interested under the will of a testator, without making proper inquiries into the conduct and dealings with the estate by the executors, instituted proceedings against them, and groundlessly charged them with misconduct, causing thereby unnecessary costs and trouble, the court being satisfied with the conduct of the executors, refused to take the further administration and winding up of the estate out of their hands; and it being shewn that all the other persons interested in the estate were satisfied with the conduct of the executors, ordered the plaintiff to pay the costs of the suit. *Rosebatch v. Parry*, 27 Chy. 193.

Executors may be deprived of their costs where they have improperly managed the affairs of the estate, though not guilty of any wilful misconduct; and this rule was acted on where the personal representative of one of the executors, was a party to the suit, though he had not acted in the management of the estate; his testator's estate being ample. *Kennedy v. Pingle*, 27 Chy. 305.

A testator gave to each of his executors a sum of \$40 "in remuneration for their trouble." In

carrying on the affairs of the estate one of the executors, with the knowledge of his co-executor, and without any remonstrance from him, used in his business \$200 of the estate, and the other had taken a mortgage, in his own name, for \$900 belonging to the estate, without executing any declaration of trust in respect thereof. Under these circumstances the court refused to the surviving executor, and to the executor of the deceased executor, their costs of the suit; the court, however, being satisfied that neither of them had been guilty of any wilful misconduct, did not charge them with costs, and allowed them the amount of their commission; but refused to allow them to receive the legacies given by the will, which were expressed to be in remuneration for their trouble. *Ib*.

Where an executor, by his misconduct in the management of an estate, causes a suit, and but for the fact of the suit having been brought the assets would have been dissipated, the court will not, as a general rule, allow such executor his costs out of the estate, although no loss has been sustained; and where in such a case, the party interested filed a bill without calling upon the executor for an account, or affording him any opportunity of shewing that his dealings were correct, the court, (Spragge, C.) refused the costs of the suit to either party up to the taking of the accounts, but directed the executor to pay the subsequent costs up to the decree. *Simpson v. Horne*, 28 Chy. 1.

The plaintiff being a lunatic, and entitled to maintenance out of the income of a fund in the hands of executors, brought an action for the income, and for administration. The master reported a balance of income in the hands of the executors, being an amount charged against them for interest upon moneys retained by them and not invested according to the terms of the will; but the conduct of the executors was otherwise proper:—Held, that if the question of the liability of the executors for the interest had been the only one in the action, the executors should have been ordered to pay the costs; but inasmuch as a general administration was unnecessarily sought by bill and granted, no costs should be awarded for or against, the executors. *McCurdie v. Moore et al.*, 2 O. R., Chy. D. 229.

In a suit for administration, it appeared that the personal representative had kept very imperfect accounts of the estate, and that those brought into the master's office had been made up partly from scattered entries and partly from memory:—Held, a sufficient justification for the institution of the suit, and that the plaintiff was entitled to the costs from the defendant up to the hearing, although no loss had occurred to the estate. *Killins v. Killins*, 29 Chy. 472.

It was also shewn that the personal representative had invested the moneys of the estate in land out of the jurisdiction of the court as well as on personal security, but no loss had been sustained, all having been repaid by the borrowers:—Held, that these facts did not constitute any ground for depriving her of the costs of suit subsequent to the decree. *Ib*.

When it appeared that the administration proceedings had been instituted without any shew of reason, or proper foundation for the benefit of the estate, and that they had not, in their results,

conducted to that benefit, the decision of Proudfoot, J., ordering the plaintiff to pay the costs of all parties, was affirmed on appeal. *Re Woodhall—Garbutt v. Hewson et al.* 2 O. R., Chy. D. 456.

Executors were charged by the master in taking the accounts in an administration suit with the sum of \$9,404.42, and allowed as disbursements the sum of \$8,228.76. These amounts included on both sides a sum of \$3,238.25, representing securities either in the possession of the plaintiff at the time of the testator's death, or handed over to the plaintiff immediately afterwards. The master allowed the executors a commission of \$400 on the total receipts, including the said sum of \$3,238.25:—Held, that the executors were entitled to compensation in respect of the said sum of \$3,238.25:—Held, that the commission allowed was not excessive. *Re Batt—Wright v. White*, 9 P. R. 447.—Proudfoot.

See *Re Donovan—Wilson v. Beatty*, 29 Chy. 280 9 A. R. 149 p. 45.

See also Sub-head II. 1, p. 267.

4. Administration ad litem.

A motion made under R. S. O. c. 49, s. 9, to appoint an administrator ad litem of the estate of a deceased person may be made before the referee, as this section merely extends a jurisdiction already possessed by him under G. O. 56. *Collver v. Swayzie*, 8 P. R. 42.—Stephens, *Referee*.—Spragge.

It is competent to the court, on a proper case being made, to appoint or dispense with an administrator ad litem, and then to direct an account, but to justify such an order it should appear not only in general terms that the estate was small, but a statement shewing the nature and amount of the personal estate ought to be produced and verified. *Re Colton—Fisher v. Colton*, 8 P. R. 542.—Proudfoot.

Held, that the court has no power, where the administration of an intestate's estate forms the subject of the suit, to appoint a representative, under R. S. O. c. 49, s. 9, as the intestate is not a party interested in the matters in question in the suit within the meaning of that section. *Hughes v. Hughes et al.*, 6 A. R. 373.

The original plaintiff having died pendente lite and an order having been obtained to continue the proceedings in the name of an administrator ad litem:—Held, that the plaintiff's costs, between solicitor and client, should be paid out of the interest recovered:—Held, also, that the administrator ad litem was not entitled to be paid the residue of the fund; but as to this liberty to apply was granted. *McCardle v. Moore, et al.*, 2 O. R., Chy. D. 229.

See *Re Donovan—Wilson v. Beatty*, 29 Chy. 280; 9 A. R. 149, p. 45.

EXPERT EVIDENCE.

See EVIDENCE.

EXPULSION

OF MEMBERS OF CORPORATIONS—See CORPORATIONS.

EXTORTION.

A magistrate acting under 32 and 33 Vict. c. 20, s. 37, D. convicted four persons for creating a disturbance thereunder, and imposed upon each a fine of \$5.00, but instead of severing the costs which he had charged, imposed the full amount thereof against each defendant, and received it from each:—Held, that under the circumstances, more fully set out in the report of the case, the overcharge must be deemed to have been wilfully made, so as to render the defendant liable to the penalty imposed in such cases by the R. S. O. c. 77, s. 4. *Parsons qui tam v. Crabbe*, 31 C. P. 151.

EXTRADITION.

I. CONSTRUCTION OF THE TREATY.

1. *Forgery*, 276.

2. *Other Cases*, 276.

II. STATUTES RELATING TO, 277.

III. EVIDENCE, 277.

I. CONSTRUCTION OF THE TREATY.

1. *Forgery*.

A prisoner was committed for extradition to the United States on a charge of having forged a resolution of a city council to the issue of bonds, of having forged a bond of said city, and of uttering the same:—Held, on an application for his discharge, that the resolution being an essential preliminary to the issue of the bond, and the bond being an instrument which might be the subject of forgery, although not executed in strict accordance with the code of the state in which the bond was issued, there was a prima facie case made out against the prisoner, and that he should be remanded as to the charge of forgery. *Regina v. Hovey*, 8 P. R. 345.—Osler.

Held, that the evidence against the prisoner of having uttered a forged instrument not being otherwise sufficient, the court could not look at an indictment against him found by the grand jury of an American Criminal Court. *Ib.*

Per Spragge, C. J. O. The forgery which is the subject of the treaty, cannot be confined to the statutory felony of forgery. *In re Phipps*, 8 A. R. 77.

See also "CRIMINAL LAW" IV., p. 184.

2. *Other Cases*.

An accessory before the fact is liable to extradition, but an accessory after the fact is not. *Regina v. Browne*, 6 A. R. 386, on appeal from 31 C. P. 484.

Semble, per Proudfoot, J.—It is not necessary for purposes of extradition that the crime charged should have been such an act as would have constituted that crime at the date of the Ashburton Treaty. It is sufficient if it constituted the crime in question at the date of its alleged commission. *In re Hall*, 3 O. R., Chy. D. 331.

II. STATUTES RELATING TO.

Held, that 40 Vict. c. 25, D., is not in force, but that the law and practice relating to the extradition of fugitive criminals between the United States and Canada, is to be found in the Ashburton Treaty, Art. X., the 31 Vict. c. 94, D., 33 Vict. c. 25, D., and the Imp. Acts, 33 and 34 Vict. c. 52, and 36 and 37 Vict. c. 60. *Re Williams*, 7 P. R. 275, approved of. *Regina v. Browne*, 31 C. P. 484; *S. C.* on appeal, 6 A. R. 386.

III. EVIDENCE.

On an application for the discharge of a prisoner committed for extradition under an order of the county judge of Kent, on a charge of murder. Per Wilson, C. J., that under the Acts mentioned in the last case, and the 32 and 33 Vict. c. 30, ss. 4, 5, a certified copy of an indictment for murder found by the grand jury of Erie county, State of New York, U. S., was of itself sufficient evidence to justify the committal of such prisoner for extradition. Per Osler, J., that such indictment was not evidence for any purpose. Per Wilson, C. J., and Osler, J., that the other evidence taken before the county judge, documentary and viva voce, set out in the report of this case, was insufficient, as it shewed at most that the prisoner was an accessory after the fact, which did not come within the treaty. Per Galt, J., that if the case had turned on the indictment alone, he would have hesitated to accept it as conclusive against the accused; but that the other evidence together with the indictment, was sufficient to warrant his extradition. *S. C.*, 31 C. P. 484. See next case.

Upon an application to the county judge of Kent for extradition of the defendant, who was under indictment in the State of New York for murder, the coroner, who had held the inquest there, proved by oral testimony before the county judge here, the original depositions taken on oath before him, and also copies of the depositions certified by him to be true copies:—Held, that under s. 14 of the Imperial Extradition Act of 1870, the original depositions were properly received, as the power given therein to use the original depositions is not qualified by 31 Vict. c. 94, s. 2, D.; and that the evidence disclosed therein was sufficient to warrant the extradition of the prisoner as an accessory before the fact:—Held, also, that the foreign indictment was not admissible as evidence against the accused. It was shewn that the only warrant issued in this case was the warrant issued by the district attorney, after the grand jury had found a true bill for murder, which did not profess to be issued upon the depositions, nor was it proved upon what evidence the bill was found. Semble, per Patterson, J. A., that the right given by sec. 14 above referred to, to use copies of depositions is confined by the effect of s. 2 of 31 Vict. c. 94, to those cases in which a warrant has been issued in the United States upon the depositions. *S. C.*, 6 A. R. 386.

Held, that the original warrant, within the meaning of 31 Vict. c. 94, s. 2 (D.), is not the first of two or more consecutive warrants, but is any warrant issued in the United States of America. *Re Phipps*, 1 O. R., Q. B. D. 586. See *S. C.*, 8 A. R. 77.

Per Patterson, J. A., remarks upon the general right of a person charged before a magistrate with an indictable offence to call witnesses for his defence, and of a person whose extradition is demanded to shew by evidence that what he is charged with is not an extradition crime. Semble, that the evidence offered in this case, as stated in the report, was improperly rejected. *S. C.*, 8 A. R. 77.

Where the facts in evidence, though sufficient to warrant extradition if deposed to by witnesses who could really testify to their occurrence, were sworn to from information only, the prisoner was discharged. *In re Parker*, 9 P. R. 332.—Osler.

See *Regina v. Hovey*, 8 P. R. 345, p. 276.

EXTRAS.

See WORK AND LABOUR.

FACTOR.

S., a manufacturer, desiring to borrow money from M., agreed with M. in writing, that M. should have the selling of the goods manufactured at his, S.'s, factory; that S. should give M. a mortgage on the factory, and premises to secure \$5,000, and interest, to be advanced by M., and should furnish to M. all the goods manufactured at the factory, and manufacture the same to the satisfaction of M., and ship the same to M., as M. directed, at such times, and in such reasonable quantities as he from time to time should direct, and should pay M. a del credere commission of seven and a half per cent. for selling the same, and interest at eight per cent. on all moneys advanced by M. over the \$5,000; and M. covenanted, as his orders were filled, and the goods received, to advance in cash to S. seventy-five per cent. of the wholesale trade value of such goods, and for that purpose the said goods were to be invoiced to M. at such value that he, M., could sell them to the best advantage. It was agreed also, that all goods manufactured at the factory should be sold only by or through M.:—Held, that the above agreement constituted M. a factor, not a pledgee, for he had power to sell without regard to any default in payment, in the ordinary course of trade:—Held, also, that M.'s authority to sell was irrevocable:—Held, further, that, under the interest which M. had in the goods, and from the nature of the dealings, and arrangements of S., and M., if S. did not repay the advances made to him, or did not deliver to M. goods sufficient to keep his advances protected by a surplus of twenty-five per cent. of goods at the wholesale trade value, and it became necessary for M. to protect himself against such default, and he could not within a reasonable time have sold to customers, he could sell by auction, and was not bound to delay until private sales could be made. It appeared that certain goods not specially ordered by the plaintiff, were sent to him by the defendant on some arrangement, on which he advanced seventy-five per cent., and which goods were sold by him in the same manner as goods sent to fill his orders:—Held, that he had the same right to sell these

goods as the goods received under the written agreement. *Mitchell v. Sykes*, 4 O. R., Chy. D. 501.

FALSE IMPRISONMENT.

See MALICIOUS ARREST, PROSECUTION, AND OTHER PROCEEDINGS—TRESPASS.

FALSE REPRESENTATION.

See FRAUD AND MISREPRESENTATION—VALUATOR.

FARM CROSSINGS.

See RAILWAYS AND RAILWAY COMPANIES.

FATHER AND SON.

See PARENT AND CHILD.

FELONY.

See CRIMINAL LAW.

FEME COVERT.

See HUSBAND AND WIFE.

FENCES.

I. COVENANT TO KEEP UP FENCES—See LANDLORD AND TENANT.

II. RAILWAY FENCES—See RAILWAYS AND RAILWAY COMPANIES.

Obligation of municipal corporation to fence ditches on highways in a dangerous condition. See *Walton et ux. v. Corporation of the County of York*, 6 A.R. 181.

Cattle straying from highway on land not fenced as required by municipal by-law.—Requisites of by-law. See *Crowe v. Steeper et al*, 46 Q. B. 87.

FERRY.

The crown granted a license to the town of Belleville, giving the right to ferry "between the town of Belleville to Ameliaburg."—Held, sufficient to warrant the court in assuming that between the one place and the other was meant. *Jellett v. Anderson et al.*, 7 A. R. 341. Reversed in the Supreme Court, May 1853.

Under the authority of this license the town of Belleville executed a lease to the plaintiff, granting the franchise "to ferry to and from the town of Belleville to Ameliaburg," a township having a water frontage of about ten or twelve miles, directly opposite to Belleville, such lease

providing for only one landing place on each side :—Held, affirming the decree of the court of Chancery, 27 Chy. 411, that this was a sufficient grant to the licensee of a right of ferriage to and from the two places named : and the defendants having started a ferry some two miles west of Belleville, running to a point nearly opposite in Ameliaburg, was such a disturbance of the plaintiff's franchise, as entitled him to a declaration of a right to the exclusive use of the ferry. Hagarty, C. J., dissenting, who considered that Ameliaburg having such an extensive frontage opposite Belleville, it was unreasonable, even if the plaintiff's claim of a right to ferry to and from was good, to require that a person crossing from that township should be compelled to go to Belleville, although his destination might be several miles therefrom : and that by the terms of the license and lease the right of the plaintiff was only to ferry one way. *Id.*

FIERI FACIAS.

See EXECUTION.

FIRE.

I. LOSS BY FIRE AFTER CONTRACT FOR SALE, 280.

II. WHEN AN EXCUSE FOR NON-PERFORMANCE OF CONTRACT, 280.

III. CLEARING LAND, 280.

IV. FROM RAILWAY ENGINES—See RAILWAYS AND RAILWAY COMPANIES.

V. LIABILITY OF TENANT AFTER FIRE—See LANDLORD AND TENANT.

VI. INSURANCE AGAINST—See INSURANCE.

I. LOSS BY FIRE AFTER CONTRACT FOR SALE.

A purchaser at a sale under decree signed the usual contract to purchase, and paid the deposit. The next day the buildings on the property were burned down :—Held, on appeal, reversing the decision of the referee, 8 P. R. 166, that the loss would not fall on the purchaser, as the interest contracted for did not vest in him till the report on sale was confirmed. *Stephenson v. Bain*, 8 P. R. 258.—Proudfoot.

II. WHEN AN EXCUSE FOR NON-PERFORMANCE OF CONTRACT.

See *Ellis v. The Midland R. W. Co.*, 7 A. R. 464, p. 130 ; *Boswell v. Sutherland*, 32 C.P. 131 ; 8 A. R. 233, p. 130.

III. CLEARING LAND.

Where fire has been properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time, and season, and managed with due care, he is not responsible for damage occasioned by it. But where the defendant, while harvesting in his own field, threw upon the ground a lighted match thinking he

had extinguished it, which however set fire to combustible material, and the defendant on afterwards discovering it, though he could easily have put it out, after confining it to one spot left it, anticipating no danger, and after burning for four or five days, the fire spread to the plaintiff's premises, and destroyed his barn with a quantity of grain and hay, the court in reversing the decision of the Queen's Bench, considered that the principle and doctrine established in *Fletcher v. Rylands*, L. R. 3 H. L. 330, and *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733, applied; and that the defendant was liable for the damage sustained by the plaintiff, even in the absence of actual negligence. *Gaston v. Wald*, 19 Q. B. 586 doubted. *Furlong v. Carroll*, 7 A. R. 145.

FIRE LIMITS.

Municipal By-law regarding fire limits. See *Regina v. Howard* 4 O. R. 377.

FISHERIES.

Under the Imperial Statute, 14-15 Vict. c. 63, regulating the boundary line between old Canada and New Brunswick, the whole of the Bay of Chaleurs is within the present boundaries of the Provinces of Quebec and New Brunswick and within the Dominion of Canada, and the operation of the Fisheries Act, 31 Vict. c. 60. Therefore the act of drifting for salmon in the Bay of Chaleurs, although that drifting may have been more than three miles from either shore of New Brunswick or of Quebec abutting on the bay, is a drifting in Canadian waters and within the prohibition of the last mentioned Act, and of the regulations made in virtue thereof. *Mowat v. McFee*, 5 S. C. R. 66.

The term "on view" in sub-s. 4 of s. 16 of the Fisheries Act is not to be limited to seeing the net in the water while in the very act of drifting. If the party acting "on view" sees what, if testified to by him, would be sufficient to convict of the offence charged, that is sufficient for the purposes of the Act. *Ib.*

See *The Queen v. Robertson*, 6 S. C. R. 52 p, 123.

FIXTURES.

The plaintiff owning land mortgaged it and afterwards built a house thereon which was placed on blocks of wood and was held by its own weight on them. Per *Armour J.* the house was a mere chattel, not having become by annexation to the land or by the intention of its owner part of the land. Per *Cameron J.* the house was a fixture. *Phillips v. Grand River Farmers Mutual Fire Ins. Co.* 46 Q. B. 334.

The court below held that the mortgagee of the realty had in this case no right to look to the machinery as security for his claim, as reported, 26 Chy. 618. On rehearing the court varied this decree by declaring the plaintiff entitled to restrain the removal of the machinery in question, by virtue of a mortgage prior to that in favour of the

plaintiff upon the machinery, and which prior mortgage had been, before the institution of this suit, assigned to the plaintiff; leaving the rights of the parties in respect of the subsequent charges on the property to be disposed of either on appeal or on further directions, or on leave reserved. *Dewar v. Mallory*, 27 Chy. 303.

S. mortgaged land upon which was a saw-mill, together with machinery, plant, trade, and other fixtures, to the Dominion Bank. He afterwards erected a drying-kiln with the necessary iron piping for drying lumber, and subsequently released his equity of redemption in all the property mortgaged to the mortgagees. The latter sold to the plaintiff the iron piping, which was claimed by defendant under a sale from S:—Held, that prima facie the piping being part of a building erected for the purpose of improving the inheritance, was a fixture, and passed to the mortgagees, either under their mortgage or the release; that the burden of shewing that it was to continue chattel property, when put into the kiln, lay on the defendant; and that the plaintiff therefore must succeed. *Burke v. Taylor*, 46 Q. B. 371.

Certain machinery was placed in a factory on the premises in question, some before and some after the execution of the mortgage to the plaintiffs in 1874. The mortgagor (the defendant) had no interest in any of the machinery at the date of the mortgage to the plaintiffs, having previously sold out to one Abel; but afterwards he became solely entitled to all of it, and he then executed a chattel mortgage of the same to the Parry Sound Lumber Company. On the reference under decree obtained by plaintiffs the master made the lumber company parties as subsequent encumbrancers:—Held, (assuming the machinery, or some portions of it, to be trade fixtures removable as between landlord and tenant,) that the machinery (or such portion aforesaid) when acquired by the mortgagor, would go to increase the plaintiffs' security; and that therefore the master was right in making the lumber company parties as subsequent encumbrancers. Further, that there appeared no good reason why the plaintiffs having purchased and taken an assignment of a mortgage made by defendant in 1869, were not entitled under that to have the greater part if not all the machinery added to their security. *London and Canadian Loan &c. Co. v. Pulford*, 8 P. R. 150.—Proudfoot.

Mortgagors of vacant land, adjacent to their foundry, which was constructed of stone, erected thereon a frame building as lean-to to the foundry, and placed in it three lathes, an iron planer, two drills, a crane and shaper, all of which, with the exception of one drill, which was bolted to the frame work, the latter being bolted to the girders, were kept in their position by their own weight, without being fastened to any part of the building, and were capable of being removed without injury to either building or machinery. When the mortgage was given the land was not worth the money advanced, but the mortgagees relied on a substantial building which the mortgagors intended to erect on it as an extension to their factory, and took a covenant to insure the building for \$4,000, but they did not bind the mortgagors to build or put in machinery:—Held, reversing the decree of Spragge, C., that the machines were not fixtures, as they were not put in the building with the intention that they should be.

come part of the realty:—Held, also, that the mere fact that such machines are brought upon the land by the owner of the freehold raises no presumption that he intends to make them part of the realty. Per Patterson, J. A., the weight of authority is against construing as fixtures anything which is not annexed in fact to the realty, except where the articles form part of the fabric as an integral portion of the architectural design, or as in the case of a mill stone, which is an essential part of the mill. *McDonald v. Weeks*, 8 Chy. 297, dissented from. *Keefer v. Merrill*, 6 A. R. 121.

The plaintiffs were registered mortgagees of a large tract of land. M. desiring to build a mill in a village where part of the land lay, took a deed of a small portion thereof from one of the owners of the equity of redemption, in order that he (M.) should erect a flouring mill thereon. M., without searching the title, and without actual notice of the plaintiffs' mortgage, erected the mill with the intention of establishing a business there. Before its completion, and before the machinery was put in, he discovered the mortgage, but proceeded to put in a boiler, engine, mill stones, and several machines necessary for carrying on milling. On the plaintiffs attempting to sell under their mortgage, the machinery was removed by M. An injunction was granted to stay the removal, and an issue was directed to try the title to the mill and machinery. A number of the machines were not attached to the building, being kept in place by their own weight; but they were necessary for the working of the mill, and suited for that purpose only, and the whole structure—building, engine house, boilers, engine, and machinery—was put up with the express purpose of establishing a flouring mill on land that M. believed to be his own:—Held, that the mill and its contents passed to the mortgagees; and an order was made for restitution of the machinery which had been removed, and the injunction extended to prevent its removal in future, with liberty to M. to pay its value to the plaintiffs, which they ought to accept, if offered, and release the machinery. *Dickson v. Hunter*, 29 Chy. 73.

Certain counters were embraced in the contract for the carpenter's work of a drug store, and nailed to a scantling, which was placed in the wall of the store. The bottom or ledge of the counters was made fast to the floor of the store, and the end connected with the frame-work of the windows in such a way that the wainscoting at the bottom of the windows would be materially injured by taking them (the counters) out, and the floor of the building also would be considerably damaged:—Held, that the counters were part of the freehold and included in a mortgage thereof, and not chattel property. *Holland v. Hodgson*, L. R. 7 C. P. 328, and *Keefer v. Merrill*, 6 A. R. 121, approved of. *McCauley v. McCallum*, et al, 3 O. R., Chy. D. 305.

FORCIBLE ENTRY.

Upon a conviction for a forcible entry an order for restitution is usually awarded in favour of the party dispossessed, irrespective of the question of title, but where redress is sought by a civil action the title of the plaintiff must be considered,

and the court will not generally investigate it upon an interlocutory proceeding, such as an application for an interlocutory injunction. *The Toronto Brewing and Malting Co. v. Blake*, 2 O. R., Chy. D. 175.

Where there are conflicting claimants to the position of president of a company, and one claimant takes forcible possession of the company's premises, the other claimant, at all events when he is at the time acting president, can bring an action to restrain him in the name of the company, although it is uncertain who is the rightful president. *Id.*

FORECLOSURE.

OF MORTGAGE—See MORTGAGE.

FOREIGN CORPORATIONS.

- I. GENERALLY—See CORPORATIONS.
- II. ASSESSMENT OF—See ASSESSMENT AND TAXES.
- III. SERVICE OF WRIT ON—See PRACTICE.

FOREIGN COUNTRY.

Devise to. See *Parkhurst v. Roy*, 27 Chy. 361; 7 A. R. 614.

FOREIGN INDICTMENT.

As evidence in extradition proceedings. See *Regina v. Hovey*, 8 P. R. 345, p. 276.

FOREIGN JUDGMENT.

See JUDGMENT.

FOREIGN LAW.

Evidence of the custom of brokers at Toledo the contract being made in Ontario was:—Held to have been properly rejected. *Williams v. Corbey*, 5 A. R. 626.

Held in this case that failing any information respecting the law in Maine, U. S., as to grants of administration, it must be assumed to agree with the law in this province. *Re O'Brien*, 3 O. R., Chy. D., 326.

Difference between our insolvent law as to set-off and that in England and the United States remarked upon. *Mason v. Macdonald*, 45 Q. B. 113.

Law of Ohio respecting property of married woman. See *Levine v. Claffin*, 31 C. P. 600.

Law of Michigan as to endorsement on note. See *Jenks et al. v. Doran*, 5 A. R. 588, p. 58.

Foreign action pending. See *The Direct United States Cable Company, (Limited) v. The Dominion Telegraph Company of Canada*, 8 A. R. 416; 28 Chy. 648, pp. 15, 180.

Proof of. See *Rice et al v. Gunn et al.*, 4 O. R. 579.

Foreign Guardian. See *Flanders v. D'Evelyn*, 4 O. R. 704.

Foreign Divorce. See *Guest v. Guest*, 3 O. R. 344; *Magurn v. Magurn*, 3 O. R. 570.

Forgery by laws of New Jersey and Pennsylvania. See *In re Jarrard*, 4 O. R. 265, p. 186; *Re Phipps*, 8 A. R. 77, p. 186.

FOREIGNER.

I. ARREST OF—See ARREST.

II. SECURITY FOR COSTS BY—See COSTS.

FORFEITURE.

I. OF DOWER—See DOWER.

II. OF INSURANCE—See INSURANCE.

III. OF STOCK—See CORPORATIONS.

IV. OF DEVISE—See WILL.

Where the plaintiffs, a municipal corporation, passed a by-law to raise \$20,000, to be given to the defendant to aid him in carrying on certain manufactures in the municipality, subject to a condition that he should give a mortgage on the premises for \$10,000, and a bond for a further sum of \$10,000, which said securities should be conditioned for the carrying on of such manufactures for twenty years, and that during the said period he should keep invested at least \$30,000 in the factory, and the defendant gave the bond and the mortgage, conditioned as agreed, but the latter not specifying for what sum it was a security, and invested the \$30,000, but did not carry on the manufactures as agreed:—Held, that R. S. O. c. 174, s. 454 authorized the taking of the mortgage by the corporation; that it must be taken to be not a charge for any specific sum, but a security for any damages the plaintiffs might have sustained by the defendant's default, to an extent not greater than \$10,000; that the court, would relieve against a forfeiture of the estate; and there should be a reference to ascertain the amount of the said damages, and on non-payment a sale of the premises. *The Corporation of the Village of Brussels v. Ronald et al.*, 4 O. R., Chy. D. 1.

Of lease for breach of covenant. See *Longhi v. Sanson*, 46 Q. B. 446.

Of right to land of railway company owing to non-completion of work. See *Grand Junction Railway Co. v. Midland Railway Co.*, 7 A. R. 681.

FORGERY.

See CRIMINAL LAW.

Payment by bank on forged endorsement of cheque. Right of the drawer to recover back. See *Agricultural Investment Co. v. The Federal Bank*, 45 Q. B. 214; 6 A. R. 192, p. 68.

See *Reid v. Humphrey*, 6 A. R. 403, p. 75.

FRAUD AND MISREPRESENTATION.

I. IN SALE OR CONVEYANCE OF LAND.

1. *Undue Influence.*

(a) *Parent and Child*, 286.

(b) *Other Persons*, 287.

2. *Fraud or Misrepresentation as a ground of Defence or Relief*, 287.

3. *Fraudulent Conveyances as against Creditors*—See FRAUDULENT CONVEYANCES.

4. *Rescinding contract*—See SALE OF LAND.

II. ACTION FOR FALSE REPRESENTATION, 289.

III. MISCELLANEOUS CASES, 291.

IV. BY ATTORNEY AND SOLICITOR—See ATTORNEY AND SOLICITOR.

V. FRAUD AND ILLEGAL CONSIDERATION IN BILLS OR NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

VI. FRAUD AND FRAUDULENT PREFERENCES—See BANKRUPTCY AND INSOLVENCY—FRAUDULENT CONVEYANCES.

VII. LIABILITY OF BANKS IN CASE OF FRAUD—See BANKS.

VIII. FRAUDULENT JUDGMENT—See FRAUDULENT JUDGMENT.

IX. COSTS IN CASES OF ALLEGATIONS OF FRAUD NOT ESTABLISHED—See COSTS.

X. IN INSURANCE—See INSURANCE.

XI. BETWEEN PRINCIPAL AND AGENT—See PRINCIPAL AND AGENT—VALUATOR.

I. IN SALE OR CONVEYANCE OF LAND.

1. *Undue Influence.*

(a) *Parent and Child*.

Seem, that the evidence more fully set out in the report of this case, shewed that the transaction was one which a court of equity would set aside as having been entered into by the father imprudently, and by reason of undue influence practised upon him by the plaintiff. *McKay v. McKay*, 31 C. P. 1.

A conveyance of land from a man ninety years old to his son was prepared on the instructions of the latter, and recited that the son had agreed to pay his father \$10 a month for his life, but no such agreement had in fact been made, and there was no other consideration. The deed was not explained to the father, and the solicitor's clerk, who witnessed it, could not say that he had even read it over to him. There was no direct fraud, but the father who had become childish was under the influence of his son and had acted without advice:—Held, affirming the decision of the

court below (27 Chy. 567) that the deed, having been executed without proper advice, should be set aside. *Lavin v. Lavin*, 7 A. R. 197.

See *Irwin v. Young*, 28 Chy. 511, *infra*.

(b) *Other Persons.*

Where it was shewn that a voluntary deed had been executed without independent advice, the grantor standing in such a relation to the grantee, as that he was likely to be under her influence, the court (Spragge, C.), owing to the peculiar relationship of the parties, set the conveyance aside, although no fraud or moral wrong could be imputed to the grantee; and although it was probable, from all the circumstances of the case, that if the contents and legal effect of the instrument had been fully explained to the grantor by an independent legal adviser, the grantor would still have executed the deed though probably with some modifications in the details. The relief was granted without costs, however, as no case of actual fraud was established:—in this following *Lavin v. Lavin*, 7 A. R. 197, *supra*. *Irwin v. Young*, 28 Chy. 511.

The defendant, a grandnephew of the plaintiff, who was of advanced age and feeble mind, obtained from the latter, a conveyance of certain land, her only property and means of maintenance, for a nominal consideration. He verbally promised to support her as a consideration for the grant. He brought a witness, who was a stranger, from a distance, to explain the deed and witness it, though other relatives in the neighbourhood were not consulted. It was explained to her that the defendant could not be legally bound to maintain her, as he was a minor. The deed contained no power of revocation:—Held, that the deed should be cancelled, on the ground that the plaintiff was not in a fit state of mind to understand its effect; but independently of this, that it had been made improvidently and under undue influence, and was wholly voluntary, and therefore could not stand. *Widdifield v. Simons*, 1 O. R., Q. B. D. 483.

See *Kilbourn v. Arnold*, 6 A. R. 158, p. 43.

2. *Fraud or Misrepresentation as a ground of Defence or Relief.*

Where on the sale or conveyance of land the existence of an incumbrance is concealed by the vendor, who covenants against incumbrances; and the purchaser executes a mortgage to secure a balance of unpaid purchase money, the court will restrain an action to enforce payment of such mortgage brought at the instance of the mortgagee—or the voluntary transferee, unless the amount of the incumbrance so concealed is deducted from the sum secured by such mortgage. *Lovelace v. Harrington*, 27 Chy. 178.

This principle was applied in a case where the purchaser was a married woman, and her husband had joined in and executed the mortgage by which he covenanted to pay the amount secured thereby, although the covenant against incumbrances was to the wife and not to the husband the covenantor himself. *Ib.*

A married woman, who could neither read nor write, and was possessed of real estate, was asked

to join in a conveyance by way of mortgage in order to bar her dower in her husband's land. The mortgagor's solicitor knew that she had objected to mortgage her land, and it was not explained to her or her husband that, by her joining, her estate would be liable in any way. In fact the husband and wife were made joint grantors, and jointly covenanted for payment. After the death of the husband, proceedings were instituted against his widow to compel payment by the assignee of the security. The court (Boyd, C.) under the circumstances, declared the instrument invalid as against the separate estate of the widow, and dismissed the bill with costs. *Burrows v. Leavens*, 29 Chy. 475.

The plaintiff induced the defendant to purchase land in Portage la Prairie by exhibiting to him a map representing the property to be in the business portion of the town, and by representing that this was true. The defendant applied to persons on the spot for information, and was told that the representations made were incorrect. But he swore that one of the plaintiffs told him that his informants were interested in depreciating the property, and that on this he purchased, paying \$500 cash, and giving a mortgage for the balance. He tried to sell, and could have sold the property for more than he gave for it, but did not go to Portage la Prairie for six months after, when he found that the representations were untrue, and repudiated the bargain. This action was brought on the mortgage, and the defendant counter-claimed for the cash payment of purchase money:—Held, affirming the decision of Armour, J., that the defendant was induced to purchase by false representations, and, reversing the judgment, that he had not disentitled himself to relief by laches; that the mortgage should be delivered up to be cancelled, and that the counter-claim for the money paid, without interest, should be allowed, on his reconveying the estate free from incumbrances created by him. *Lee v. McMahon*, 2 O. R., Q. B. D. 654.

The plaintiff, an illiterate man, held a bond for a deed of certain land on which a balance of purchase money was unpaid, and had acquired a title to the lands under the statute of limitations but was not aware of the effect of his possession. The defendant, who had purchased the interest of the heirs of the original owner and vendor and his solicitor, by representing to the plaintiff that he had no title, induced him to accept a lease of the land from the defendant for two years, at a nominal rent with a covenant to yield up possession at the end of the term:—Held, that under the circumstances the lease must be set aside, but even if allowed to stand it would not constitute an acknowledgment sufficient to displace the plaintiff's title, for its effect would only be to create an estoppel during its continuance. *Hillock v. Sutton et al.*, 2 O. R., C. P. D. 548.

Semble, per Osler, J., that although the evidence in this case shewed that there was no intention to deceive on the part of defendant's manager, still there was such a misstatement of a material fact as but for the notice received by plaintiffs through their solicitor would render the defendants liable for the damage sustained thereby. *The Real Estate Investment Co. v. The Metropolitan Building Society*, 3 O. R., C. P. D. 476.

See also *Schultz v. Wood*, 6 S. C. R. 585.

II. ACTION FOR FALSE REPRESENTATION.

W. conveyed to his nephew, E., for an alleged consideration of \$1,200, 50 acres of land, and afterwards these parties applied to the plaintiff the appraiser of a loan company, for a loan of \$1,000 to pay, as was alleged, upon the purchase money, W. asserting that the property was well worth \$2,200 cash, or \$2,500 on a fair credit. The plaintiff, relying on the statements of W. certified the value accordingly and the loan was effected. The land was not worth the \$1,000 advanced, and sold for \$800, leaving a balance due the company of nearly \$500, which they required the plaintiff to pay, and which he did settle with the company for, considering himself liable, and obtained from the company an assignment of their securities. The court (Pondfoot, V.C.) being satisfied that the whole transaction was a fraudulent scheme to obtain the loan upon the certificate of the plaintiff, ordered both defendants to make good the deficiency, and pay the costs of the suit; holding that the plaintiff was entitled to take an assignment of the claim as against W. to indemnify himself; that he could sustain this suit though he had only secured the money without paying it; that he had an independent right of suit against W. for the misrepresentation, and that it was unnecessary that the denial in the answer should be met by more than the plaintiff's own evidence, for the defendant had been examined, and had furnished sufficient ground for discrediting himself. *Moberly v. Brooks*, 27 Chy. 270.

Defendant was mortgagee of plaintiff's farm, and the latter, being unable to pay the mortgage, asked defendant to buy the farm, and defendant offered him therefor some cash and a mortgage for \$619, representing to him that the mortgage was a second mortgage; that the land was as good as defendant's own land, and that any money-lender would readily cash it at a small discount, thus inducing plaintiff, an ignorant man, to accept it, when in fact the defendant knew it was a fourth mortgage and almost worthless. After this an abstract of title was shewn to the plaintiff, but it did not appear that he read it or that it was read or explained to him. The jury having found for plaintiff in an action for deceit, on motion for a nonsuit:—Held, that there was no obligation on the plaintiff, as a matter of law, to examine the title or search the registry office, but that his omission to do so was matter for comment only; and that his having been furnished with the means of knowing, of which he did not avail himself, after the false statements had been made, was no answer to the action. Semble, that on sustaining the verdict a reconveyance of the mortgage to defendant might be ordered. Nothing was said as to the amount of the prior mortgage, but the jury having found that the representation was false to the knowledge of the defendant, and was made with intent to deceive, and did deceive the plaintiff:—Held, that taking the whole statement together the verdict was not unwarranted. *Barr v. Doan*, 45 Q. B. 491.

By a covenant in a lease of a farm from defendant to the plaintiff it was provided that upon receiving six months' notice from the lessor that he had sold the farm, and upon receiving compensation for all labour up to the date of the notice, from which he had derived no return, the

lessee would deliver up possession at the end of six months, the compensation being duly paid. Defendant served the plaintiff with a notice that he had sold the farm, in consequence of which the plaintiff desisted from putting in crops, and other work for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff refused to give up possession, and sued the defendant for false representation:—Held, reversing the judgment of the Q. B., 45 Q. B., 94, that the plaintiff was entitled to recover the damages sustained by him in consequence of the notice. *Cowling v. Dickson*, 5 A. R. 549.

The plaintiff in 1873 sold to defendant certain timber limits and chattel property for \$85,000, payable in eight yearly instalments, with many special terms as to advances to be made by plaintiff to defendant to assist him in getting out lumber thereon, commission to be paid by defendant to plaintiff, &c. By deed in 1878, reciting that defendant had been unable to carry out this agreement, it was agreed that in consideration of defendant being released from all obligations to plaintiff except as set out in a deed of composition of the same date, the said agreement should be cancelled. By the composition deed, between the plaintiff and his creditors, to which defendant was a party, the creditors agreed to accept 25 cents in the \$, on their respective claims, which was to be paid in part out of the proceeds of a raft belonging to defendant, then on its way to Quebec, and the balance in three years; and certain lands were assigned as security. To enable defendant to transport his said timber to market, the plaintiff agreed to advance the necessary funds, for which he was to have a preferential claim on the proceeds. The unpaid balance due by one J., under an agreement made by the plaintiff was to be deducted from the full and not from the reduced amount due to the plaintiff; and in fixing the amount due to the plaintiff, \$30,000 was to be deducted for the retrocession of the limits, which the plaintiff had agreed to sell to defendant by the cancelled agreement. It appeared that the defendant in 1878, representing himself to be unable to meet his engagements, and to be largely indebted to one E., among others, and owing the plaintiff about \$80,000, had called a meeting of his creditors, the result of which was the composition deed mentioned and the agreement of the same date with the plaintiff. The plaintiff had taken possession of the property so taken back by him, and had received the advances made by him to enable the defendant to get down the raft, and part of the money due by J. He had never offered back to defendant such property or money, nor offered to release the security, and E., with defendant's other creditors, had been paid in full. Having discovered that there was no debt due by the plaintiff to E., the plaintiff sued on his agreement of 1873:—Held, (Armour, J., dissenting,) that the whole transaction evidenced by the two deeds in 1878, must be regarded as one arrangement; that the plaintiff could not be treated as a creditor who had received part of his claim, and been induced by fraud to release the residue; that he could not repudiate the release for fraud, not being in a position or having offered to repudiate the whole arrangement; and that his proper remedy was an action for the damages caused by defendant's deceit.

Per Armour, J., the composition having been obtained by fraud, the plaintiff was entitled to sue for the balance of his debt, crediting the agreed price of the property and money received to the defendant. *Fraser v. McLean*, 46 Q. B. 302.

There must be a wilful and fraudulent statement of that which is false to maintain an action of deceit, and the law still distinguishes between legal and moral fraud in this respect. Therefore, where the plaintiff sued a certain company and its promoters, seeking to have his name removed from the list of shareholders, and to have the money paid for his shares repaid to him by the defendants, on the ground of fraudulent representation and concealment by the said promoters, but failed to prove that the latter had been guilty of any fraudulent intent, or that they had made representations knowing them to be false, or with a reckless disregard as to their truth or falsehood, it being admitted that, as far as the suit related to the said promoters, it was simply an action of deceit:—Held, the plaintiff's case failed as against the latter:—Held, also, that as against the company, though the plaintiff, had he come before the court in good time, might perhaps have had his contract rescinded, yet his having, as the fact was, acted at a meeting of the shareholders after knowledge of what he now charged against them, precluded him from asserting any such right now, and his bill must be dismissed, with costs. *Petrie v. The Guelph Lumber Co. et al.*, and two other Cases, 2 O. R., Chy. D. 218.

Action against personal representatives of deceased person who is charged with fraud. See *Hamilton Provident & Loan Society v. Cornell*, 4 O. R. 623.

See *Lee v. McMahon*, 2 O. R. 654, p. 288. See also *The Merchants' Bank v. Thompson—Mallon v. Craig*, 3 O. R. 541.

See also VALUATOR.

III. MISCELLANEOUS CASES.

If a person borrows money from an innocent lender, and employs it in preferring a creditor, the lender is not debarred from suing for its repayment; and if he holds security, such as the mortgage from J. and R. to D., in this case, he can charge the money so loaned on such security. *Court v. Holland, et al.*, 4 O. R., Chy. D. 688.

See *Norvall v. Canada Southern R. W. Co.* 5 A. R. 13, p. 19.

FRAUDS (STATUTE OF.)

- I. RESPECTING AGREEMENTS—See CONTRACT.
- II. PROMISES TO THIRD PARTIES—See GUARANTEE AND INDEMNITY.
- III. RESPECTING LEASES—See LANDLORD AND TENANT.
- IV. RESPECTING SALES OF GOODS—See SALE OF GOODS.
- V. RESPECTING SALES OF LANDS—See SALE OF LAND.

VI. PAROL EVIDENCE TO VARY DEEDS OR WRITINGS—See EVIDENCE.

Rent issuing out of land is a tenement; it partakes of the nature of land, and is within the fifth section of the statute of frauds, and hence is also within 25 Geo. II. c. 6, s. 1. *Hopkins v. Hopkins et al.*, 3 O. R., Chy. D. 223.

See also *Bland v. Eaton*, 6 A. R. 73.

FRAUDULENT CONVEYANCES.

I. AS AGAINST CREDITORS.

1. *Under 13 Eliz. c. 5 and R. S. O. c. 118.* 292.
2. *Preferential Assignments.*
 - (a) *Generally*, 297.
 - (b) *Bills of Sale and Chattel Mortgages*, 299.
3. *Under Insolvent Acts—See BANKRUPTCY AND INSOLVENCY.*

II. AS BETWEEN PARTIES—See FRAUD AND MISREPRESENTATION.

III. BY MARRIAGE SETTLEMENT.

1. *Before Marriage*, 302.
2. *After Marriage*, 303.

IV. PRACTICE IN SETTING ASIDE.

1. *Pleading and Parties*, 305.
2. *Costs*, 306.
3. *Other Cases*, 306.

I. AS AGAINST CREDITORS.

1. *Under 13 Eliz. c. 5 and R. S. O. c. 118.*

A son left his father's house at the age of sixteen, with the assent of the father, a farmer, and went to teach school at a distance, it being agreed that he should remit to his father from time to time a part of his earnings, and that the same should be repaid by the father after the son attained majority, as the son should want it. Accordingly remittances were alleged to have been made to his father, which, on the son coming of age, amounted to \$600, and upwards, when he found his father was unable to repay his advances. It was arranged that the son should make further advances, and that unless the father paid them the son was to have the farm conveyed to him, subject to certain incumbrances upon it. Advances were subsequently made by the son, and on a settlement made in 1877, it was ascertained that the father's indebtedness amounted to \$1,600 and upwards, which it was then agreed should be the consideration for the purchase of the equity of redemption of the father in the premises, the conveyance of which was impeached by a judgment creditor of the father under 13 Eliz. The court being satisfied of the bona fides of the dealings between the father and the son, and that the sums claimed had really been advanced, (although the only evidence of the dealings was that of the father and son) dismissed the bill; but, without costs. *Jack v. Greig*, 27 Chy. 6.

A bill was filed in 1880 alleging that in June, 1864, the defendant L. conveyed to the defendant R. a lot of land, which conveyance was either voluntary or the consideration received therefor had been repaid, and that L. had ever since occupied the lands, without any acknowledgment of title in R. up to January, 1880, when L. attorned to R., placing his (L.'s) son in possession. On the hearing it was satisfactorily established that R. was a mortgagee of the property, and that in 1864 the equity of redemption had been released in consideration of further advances to L., who then left the country, and did not return until 1867, when he went into possession, and expended large sums of money in improvements, made after consultation with R., and which were so made in lieu of rent. The court, (Prondfoot, V.C.), was of opinion that the suit entirely failed so far as it rested on the fraudulent character of the original transaction between L. and R., and that L. had not acquired a title by length of possession, but that if he had he was not bound to assert it so as to enable an execution, sued out at the instance of the plaintiffs, to attach upon the property. *Keefer v. Keefer*, 27 C. P. 257, and *Foster v. Emerson*, 5 Chy. 134 remarked upon. *Workman v. Robb*, 28 Chy. 243. Affirmed, 7 A. R. 389.

In a suit by a creditor impeaching a sale by N. to his sister, made in consideration of her assuming two mortgages on the land, certain executions against him which she paid, and of a debt due to herself, it appeared she was aware of the plaintiff's claim; that her brother had no other property to meet it; that he was of improvident habits; that a sheriff's sale was pending; that N. had previously refused a larger sum for the land than his sister gave; that N. continued after the sale to reside on the land; that she shortly afterwards sold the estate for more than twice what she gave for it, and that she bought other lands with part of the proceeds, upon which lands N. went and resided:—Held, that sufficient was shewn to warrant a decree declaring the conveyance by N. to his sister fraudulent as against creditors under the statute of Elizabeth. *Merritt v. Niles*, 28 Chy. 346.

S. purchased lands with moneys payable to him by the crown for work done under a contract, which lands he procured to be conveyed to his wife:—Held, that although the moneys could not be reached by garnishing them before being paid by the crown, yet that the money having passed out of the crown, by reason of the husband's appointment in favour of his wife, the effect was to defraud creditors, and the gift was therefore void under the statute of Elizabeth. *Nicholson v. Shannon—McPherson v. Shannon*, 28 Chy. 378.

A sale of a lot at an absurdly inadequate price, the sale being otherwise attended with suspicion, was set aside as fraudulent under the statute of Elizabeth. *Bank of Toronto v. Irwin*, 28 Chy. 397.

H. obtained from his debtor an absolute conveyance of land as security, which was attacked by the plaintiff, who had subsequently recovered an execution against the grantor, as being a fraudulent preference. It was shewn that the deed, after its execution, had been altered by the grantee so as to convey the correct lot (22 instead of

122), the only lot owned by the grantor; but no re-execution or acknowledgment took place; the grantor, however, accepted a lease from H. of the correct lot, which he afterwards surrendered to H.:—Held, that as the grantor, according to the ruling in *Sayles v. Brown*, 28 Chy. 10, could not claim to have the conveyance vacated, so neither could his creditor, the plaintiff. *Sommerville v. Rae*, 28 Chy. 618.

H. insisted that the conveyance to him was bona fide, while the grantor alleged it had been obtained by the fraud of H., the court (Blake, V. C.) in view of the fact that the grantor in another suit had sworn that it was made for a valuable consideration and in good faith, refused the relief asked; the other circumstances in the case being such as not to justify a decree on the grantor's present statements, although not estopped by the first statement, but that he was at liberty now to present the facts otherwise. In such a case the explanations given for the different account of the transaction must be convincing. Under these circumstances, and H. claiming to hold the land only as security for the amount due him, and the court being satisfied of the bona fides of the transaction, ordered an account to be taken of the amount due H., and the land to be sold; the proceeds to be applied first in payment of the amount due to H. for principal, interest, and costs, and the balance as in ordinary fraudulent conveyance cases; and for these purposes the usual reference to the master was directed. *Id.*

Semble, where one creditor, having obtained property from his debtor in fraud of other creditors, has realized the property, and received the proceeds in a shape that cannot be earmarked, another creditor who has thereby been defrauded, cannot make the preferred creditor account for the said proceeds, but has no other remedy than that prescribed by 13 Eliz. c. 5, s. 2. *Davis v. Wickson*, 1 O. R., Chy. D. 369.

An execution issued on the same day that a judgment on default of appearance, contrary to Order 9, Rule 4, is signed, is an irregularity only, and not a nullity. M., a merchant, who was in insolvent circumstances, and had purchased largely from defendants, stated an account with the defendants as for cash due, in which were included some acceptances maturing, which were then delivered up to him, he receiving a buyer's discount of five per cent. By arrangement the defendants recovered judgment by default of appearance, and under an execution issued on the same day plaintiff's stock in trade was sold by the sheriff, the defendants becoming purchasers. E., the defendant's agent, wrote to the defendants before suit, that he had arranged with M.'s consent to issue a writ for judgment, and take everything, and they would then let M. go on and reduce his stock, and see what the spring trade would do. The plaintiffs, ten days after, obtained judgment and execution under Rule 324, and the defendants having subsequently purchased the goods under these and other executions, an interpleader was directed:—Held, Armour, J., dissenting, reversing the judgment of Armour, J., at the trial, that the defendants' judgment, execution, and purchase at the sheriff's sale were not a gift, conveyance, assignment, or transfer of M.'s goods within the meaning of R. S. O. c. 118, s. 2:—Per Cameron, J.—The statute, R. S.

O. c. 118, should be construed strictly. It is in derogation of the common law, and does not operate to give all the creditors of a debtor a ratable share in his effects. Before setting aside the debtor's preference for a legislative preference not more honest, it should be clear that the debtor has done something which brings him within the enumerated acts which the statute prohibits. *Macdonald et al v. Crombie et al.*, 2 O. R., Q. B. D. 243. Affirmed. See 20 C. L. J. 146.

The male defendant mortgaged his property several times, and finally sold the equity of redemption. His wife barred her dower in each mortgage, under an agreement with her husband, made on the first occasion, that he would convey other property to her. Upon this claim being reiterated on the sale of the equity of redemption, and the refusal of the wife to join in the conveyance unless the promise of the husband was fulfilled, the husband conveyed other land to a trustee for her. The effect was that the plaintiff, a creditor of the husband was delayed and hindered in recovering his debt:—Held, affirming the decision of the court below, that the conveyance to the wife's trustee, was not voluntary: and as the transaction had been found to have been bona fide, and without intent to defraud creditors, it could not be impeached under 13 Eliz. c. 5. *Beavis v. Maguire et ux.*, 7 A. R. 704.

Held, that a deed of assignment of lands in trust for creditors, under the circumstances of this case, was not void under 13 Eliz. c. 5; and that sec. 18 of the Indigent Debtors Act, now R. S. O. c. 118, s. 2, does not refer to real property. *McNab v. Peer et al.*, 32 C. P. 545.

On 4th April, 1863, M. and his wife (to bar dower) mortgaged the lands in question to C. On 21st May, 1867, M. being in insolvent circumstances, conveyed the said lands to W. to the use of M.'s wife. In 1868 and 1872 M. executed two other mortgages to C. for the debt originally secured by the first mortgage. On 20th December, 1874, M. and his wife (to bar dower) mortgaged the said lands to C. All the above deeds were registered about the time of their respective executions. On 6th March, 1876, G. assigned to the plaintiff, but the deed was not registered. On 7th June, 1876, M. and his wife jointly mortgaged the same lands to the plaintiff by deed registered 15th July, 1876. On 21st May 1874, W. and M. and his wife granted and released the said lands to C. until payment of the mortgage of 1872, and on payment thereof to the use of M. in fee. This, however, was not registered till 4th August, 1881. The plaintiff had no notice that the conveyance from M. of 21st May, 1867, was invalid, nor of the conveyance of 21st May, 1874, but he had notice of the three mortgages to C., and that C. claimed the whole debt against the land, and also that there was a defect in C.'s title under the second and third mortgages:—Held, that the plaintiff, being bound by such notice, could not avail himself of any defect in title arising from M. executing the latter two mortgages to C., although still being the owner of the equity of redemption, that the plaintiff acquired his title with knowledge that C. claimed a debt represented by the three mortgages, and took his mortgage, subject to such claim by C.:—Held, also, that the deed from M. of 21st May, 1867, was either voluntary or a fraudulent preference, and in either

case void; and that the fact that M.'s wife joined to bar dower, in the two last mortgages to C. after she had apparently become the owner of the equity of redemption, constituted her a party to the accounting which took place with C. in respect to the continuing debt, and bound her in her character of assignee of the equity of redemption if she could be so considered. *Edwards v. Morrison et al.*, 3 O. R., Chy. D. 428.

D., the purchaser of land, in 1856, gave a mortgage thereon to A., the vendor, to secure part of the purchase money. Taxes were allowed to accumulate, for which the land was sold, and D. became the purchaser in 1868. In 1872, D. made conveyances of his other land and personal property to his two sons, each of whom gave back a mortgage to secure the maintenance of D. and his wife, and the payment of certain sums to other children. No claim was made on the mortgage given by D. until 1876, and the plaintiff claiming as assignee of A., recovered judgment against D. in June, 1878, on the covenant. In the same year, in order to defeat this judgment, the mortgages made in 1872 to D. were released and new mortgages made to his wife securing substantially the same provision. The plaintiff having obtained a decree in the court below to set aside the transactions of 1872 and 1878, as fraudulent against creditors, such judgment was reversed on appeal. Per Burton and Patterson, J.J.A., the transaction of 1872, upon the evidence more fully set out in the report, was not fraudulent, for it was not voluntary, but brought about by pressure on the part of the sons, and was for valuable consideration; the mere fact, therefore, if it were shewn, of creditors being delayed would not dispense with proof of intent to delay, &c., and there was no sufficient proof of such intent, either on the part of the father or sons, and certainly not on the part of the latter, which was essential, for the evidence went to shew that this debt, which was the only one, was neither known nor apprehended. Per Burton, J.A.—The allegation in the bill that the plaintiff was a creditor in respect of a debt existing before 1872, was not proved, for there was no sufficient proof of any assignment to the plaintiff, of which the judgment was no evidence, and a deed of the land by the mortgagee, A., to the plaintiff, would not operate as an assignment of the debt or of the mortgage; nor was it sufficient to shew the mortgage, and that the judgment was for the money secured by it. Per Patterson, J.A.—Proof of the assignment was immaterial, for the plaintiff had judgment for the mortgage debt, and if the intent to defeat such debt had been shewn, the grantees of the land could not question the execution plaintiff's title. *Allan v. McTavish*, 8 A. R. 440; reversing, 28 Chy. 539.

One S., a trader, who was in embarrassed circumstances, on consultation with W., one of his creditors, was advised by him to make an assignment of all his stock-in-trade and effects, which he did to his wife, in whose name the business was afterwards carried on, she obtaining from the plaintiffs goods on her own credit; and on the plaintiffs agreeing to settle the claims of two other creditors, which they did, she executed to them a chattel mortgage on all the effects in her shop. The sheriff having seized the goods under an execution at the suit of another creditor, the plaintiffs instituted inter-

pleader proceedings:—Held, that the mortgage to them was a fraudulent preference, and as such void against creditors. *Boyd et al. v. Glass*, 8 A. R. 632.

See *Davidson v. Maguire*, 7 A. R. 98, p. 302.

2. Preferential Assignments.

(a) Generally.

A man in insolvent circumstances was sued about the same time by two creditors, one of the plaintiffs being his son. To the one action he entered a defence, while to the other, that brought by his son, he made no defence, by reason of which judgment was obtained therein and all his effects sold, which were bought in by an agent of the son, the whole realizing less than the debt, interest, and costs. In order to make up sufficient to satisfy the balance of his son's claim, the defendant in the action was urged to make an assignment to his son of all his book debts, which he did, thereby denuding himself of all property:—Held, that as the book debts could be seized under an execution, the assignment thereof was a fraudulent preference within the Act; and the assignment being declared void, the son was ordered to account for the moneys received thereunder. Under the circumstances no costs were allowed to either party. *Labatt v. Birtel*, 28 Chy. 593.

B., an insolvent debtor, made a deed of his stock-in-trade and lands to the plaintiff in trust, to convert the same into money, pay the expenses of the trust, retain ten per cent. of moneys received by way of compensation, and pay the present execution and other privileged creditors, if any, according to priority, next to divide the balance *pari passu* amongst all other creditors, and to pay the surplus, if any, to B. The plaintiff took possession under the deed. The trustee was not a creditor, and there was no evidence of any acceptance of the deed by, or communication of it, to any of the creditors. The defendants seized under an execution a few days after the deed:—Held, affirming the judgment of the county judge of Halton, that the deed was a revocable, voluntary instrument, the relation of trustee and cestui que trust not having been established between the plaintiff and the creditors, and therefore void as against the defendants. Held, also, that it was void under R. S. O. c. 118, s. 2, as it did not provide for the paying ratably and proportionably, and without preference or priority all the creditors, but gave a preference to others besides execution creditors. *Andrew v. Stuart et al.*, 6 A. R. 495.

V., who was a practising attorney and also clerk of the peace and county attorney, having been ordered to pay over certain moneys, or in default be struck off the roll of attorneys, made an assignment of his emoluments as county attorney to H., W., and J. to secure the amount which he had been ordered to pay their client, at the same time telling H., W., and J. that he would leave it to them to hand him back such part as they chose on which to live, such an assignment being generally executed at the beginning of each quarter, upon which they drew the amount coming from the county and handed V. back a portion to live on. Subsequently V. recovered a judgment in favour of a client, on

which costs were taxed in his favour at \$164, which he also assigned to secure the same claim. About a month afterwards the plaintiff G., as an execution creditor, obtained an attaching order:—Held, (affirming the judgment of Senkler, county judge,) that the existence of the order held by H., W., and J., was a sufficient pressure to prevent the assignment executed by V. being considered a preference within the meaning of the Act, R. S. O. c. 118. *Grant v. Van Norman, Bacon et al., Garnishees and Kinney Claimant*, 7 A. R. 526.

Two persons carried on business under the name of "G. & W." Having become unable to pay their liabilities, they made an assignment to the plaintiffs of all their partnership effects and of all the personal effects of G., "other than wearing apparel," in and about the dwelling-house of G., in trust to pay all the creditors of "G. & W."—Held, (affirming the judgment of the court below, 32 C. P. 68,) that the deed was void, in consequence of providing for the payment of partnership creditors only; and parol evidence was not admissible to prove that the object of the parties, in making the assignment, was to provide for the payment of separate as well as partnership creditors. *Mills et al. v. Kerr et al.*, 7 A. R. 769. See *McKittick v. Haley*, 46 Q. B. 246; *Re Walker*, 8 A. R. 169.

W. and W. made an assignment of all their assets, both separate and partnership property, to the plaintiff in trust, to realize and pay "all the just debts of the said creditors of the said debtors ratably and proportionably, and without preference or priority." There was a proviso that the trustee might pay any creditor in full whose debt constituted a lien on any part of the assets, whenever he deemed it advisable so to do. It appeared that one of the partners had no property, and owed but \$110: that the other had some household furniture which was seized for rent, which it satisfied: that he owed less than \$100 otherwise; and that all these separate debts had been satisfied:—Held, Cameron, J., dissenting, that the assignment was not void in providing for payment of partnership creditors only. Held, also, that the provision that the trustee might pay off any lien or charge on the assets, did not invalidate the assignment. Held, also, that there was, under the facts stated in the report of the case, an actual and continued change of possession. *Kerr v. The Canadian Bank of Commerce*, 4 O. R., Q. B. D. 652.

A deed of assignment after reciting that the assignor was indebted in sundry sums which he was unable to pay in full, and was "desirous of making a fair and equitable distribution of his property and effects among his creditors, for the purpose of paying and satisfying ratably, proportionately, and without preference or priority, all his creditors their just debts," conveyed all his property to the plaintiff, a creditor, in trust to sell, and out of the proceeds to pay in full the several debts, &c., then due by the assignor to the plaintiff, and the several other persons and firms, "designated in the schedule hereto annexed marked B," and if not sufficient for such purpose, then to distribute the assets ratably amongst such scheduled creditors; and secondly to return the surplus, if any, to the plaintiff:—Held, that although the recital was comprehensive enough to include all creditors, the operative

part of the deed was clearly restricted to scheduled creditors, and that the assignment was therefore invalid. *McLean v. Garland*, 32 C. P. 524.

Where T., being then insolvent, transferred to A., one of his creditors, all his estate and effects, and it appeared that the impelling cause of the transfer was the application of A. to be paid or protected, and the present plaintiff, also a creditor, sought to set aside the said transfer as a fraudulent preference:—Semble, the transfer was not “voluntary” within R. S. O. c. 118, and could not be set aside. Before the present proceedings A. had transferred the said effects for value to a bona fide purchaser:—Held, that A. could not, in any event, be called on to make good the value of the goods, as if he were a debtor of the plaintiff. *Stewart et al. v. Tremain et al.*, 3 O. R., Chy. D. 190.

By an assignment for benefit of creditors, of all the real and personal estate of the assignors, the assignee was empowered to sell the property assigned “by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to these presents,” and the trusts were declared to be, (1) for the payment of expenses, (2) to retain a reasonable compensation, based upon the time and trouble bestowed in and about the trusts, (3) after a just and equitable distribution of the expenses as between partnership and separate estate, “to pay and divide the residue of the partnership estate and the surplus of the separate estates unto and among all and every the creditors of the said partnership, according to the amount of their respective claims ratably and proportionably; and the respective separate estates (less proportion of the costs, charges, expenses, and allowances), and any surplus of the partnership estate, unto and among the separate creditors respectively,” and it was provided that the assignee “shall only be answerable or chargeable for wilful neglect or default.”—Held, affirming the judgment of the court below, that the deed could not be impeached as a fraudulent preference of creditors within the Act R. S. O. c. 118. *Badenach v. Slater*, 8 A. R. 402. Affirmed in the Supreme Court, 23rd June 1884.

(b) *Bills of Sale and Chattel Mortgages.*

G. & E., bakers, on the 18th May, 1880, agreed with the defendants that if the latter would supply them with flour they would give them a chattel mortgage on their horses, waggons, and baking utensils. Defendants accordingly delivered from day to day a quantity of flour to G. & E. On 26th May, the chattel mortgage not having been executed, the defendants wrote to G. & E. to have it done. The mortgage was accordingly drawn, covering the sales made, and was executed by the mortgagors only on 10th June, 1880, and filed on the 12th. G. & E. absconded on the 12th, and on the 14th defendants took possession under a clause in the mortgage which allowed them to do so in case the mortgagors “should attempt to sell, dispose of, or in any way part with the possession of said goods,” and removed them to their own warehouse. The mortgage also contained a re-demise clause. The

jurat of the affidavit of bona fides was not signed by the commissioner. The defendants swore that they would not have advanced the flour if this security had not been promised, and that they had no intention of getting a preference over other creditors. The plaintiff’s writ of attachment issued on the 17th June, and the sheriff seized the goods under it on the 30th June:—Held, that the mortgage must be considered as having been given when the contract to give it was entered into, viz., when the flour was first sold on credit on the 18th May, to enable defendants to carry on their business; and therefore there was, under R. S. O. c. 118, no preference of defendants, who became creditors only by this act:—Held, also, the property having passed by the bill of sale, and the defendants being in actual possession when the plaintiff’s attachment issued, that they had a right to retain the goods as against the plaintiff, subject to the mortgagors’ right of action, if any, for taking possession before default. Semble, however, that under the clause in the mortgage above mentioned, defendants were justified in taking possession, when the mortgagors absconded, leaving no one in charge of the goods. *Robins v. Clark et al.*, 45 Q. B. 362.

Where there is a promise to execute a chattel mortgage, upon the faith of which money is advanced, or where there is a pre-existing duty to give such a mortgage, which is in consequence of pressure subsequently executed, the mortgage is not void under R. S. O. c. 118:—Held, also, that the doctrine of pressure which obtained before the insolvency laws, now occupies the same position since their repeal. *Brayley v. Ellis et al.*, 1 O. R., Chy. D. 119. Affirmed, see 20 C. L. J. 144.

The plaintiffs were execution creditors of one of two co-partners in trade, both of whom had joined in an assignment by way of mortgage of all their goods and chattels, and also certain lands, comprising all the real estate owned by the judgment debtor, as an indemnity to the assignee against an incumbrance on lands sold and conveyed by both parties to the assignee. The bill charged that such assignment was executed in fraud of creditors, as by reason of the joint occupation of the partners the sheriff was unable to ascertain what portion of such chattels belonged to the execution debtor, and prayed a declaration that such assignment was void as against the plaintiffs, and that such portion of the goods and lands as was not required to indemnify the assignee might be sold, and the proceeds applied in payment of the plaintiffs’ claim. A demurrer by the execution debtor for want of equity was allowed, with costs. *Bank of Rochester v. Stonehouse et al.*, 27 Chy. 327.

L. being in insolvent circumstances executed a chattel mortgage to D. who was cognizant of his state; and shortly after the execution thereof, in collusion with the mortgagee, but against an expressed prohibition, made a delivery or pretended sale of the goods to one M., which was contrary to the terms of the mortgage, and the mortgagee sued for breach of the covenant therein, adding the common counts, the mortgage having then three months to run:—Held, that the mortgage and judgment, so far as the covenant was concerned, were void, as being a fraud upon creditors. *King v. Duncan*, 29 Chy. 113.

The mortgagor was really indebted to the mortgagee upon an account, though the time for payment was extended three months by the mortgage :—Held, that the mortgagee was entitled to retain his judgment on the common counts as there was not any violation of the Act (R. S. O. c. 118,) in the debtor when sued not insisting on the fact of the credit not having expired, or that the debt had been merged in the mortgage. *Id.*

The relation of landlord and tenant may be created by proper words between mortgagee and mortgagor for the bona fide purpose of further securing the debt without being either a fraud upon creditors or an evasion of the Chattel Mortgage Act. *Trust and Loan Co. v. Lawrason*, 6 A. R. 286. Affirmed on appeal to Supreme Court.

The trustees of a church had been sued by the defendant, and pending the action they passed a resolution authorizing the raising by loan of \$400 to pay off urgent claims, which recited that it was necessary to give security to the party making the advance. The plaintiff, being one of the trustees, thereupon advanced the money, obtaining from the trustees a chattel mortgage on all the movables contained in the church, which was prepared by a partner of the general solicitor of the trustees who was defending the action against them, but neither partner was called as a witness on the trial. In an interpleader issue the learned judge found for the defendant :—Held, (Burton, J., dubitante,) affirming the decision of the C. P. Div., that the mortgage was not invalid under R. S. O. c. 95, s. 13, and the fact that all the movable property of the mortgagors was included in the security, was not of itself sufficient to satisfy the court of any fraudulent intent in making it. *Brown v. Sweet*, 7 A. R. 725.

R. being a creditor of A. applied to him to give security for his debt, and, under threat of suit, procured from him a chattel mortgage on his stock-in-trade. Although R. knew A. to be in difficulties, and had also the means of learning that he was insolvent, it did not appear that he actually knew that A. was insolvent when he obtained the mortgage; while the mortgagor sought to gain time and to go on with his business :—Held, that the mortgage given under such circumstances was not a fraudulent preference within R. S. O. c. 118. *Segsworth v. Meriden Silver Plating Co.*, 3 O. R., Chy. D. 413.

The plaintiff was married in 1876 without any marriage contract or settlement, being possessed of about \$1,500 derived from the estate of a former husband, which she lent at different times to her husband, directly or in paying his debts, a small portion having been lent prior to their marriage. In January, 1879, on a further advance of \$200, she obtained from her husband a chattel mortgage of certain goods, farm stock, implements and other chattels, which was duly registered but not renewed. In November, 1879, she insisted upon and obtained from her husband a bill of sale and other goods, for the expressed consideration of \$300. The plaintiff and her husband continued to reside together, and apparently had the use of the goods in much the same way as prior to such bill of sale being made, she and her sons working the farm on which the parties resided, and which had been conveyed by her husband to a trustee for the benefit of the plaintiff, the husband working or not as pleased

himself. The evidence established the bona fides of the claims set up by the plaintiff, and for the purpose of securing a creditor of the husband she executed a chattel mortgage in her own name on the goods :—Held (affirming the Judge of the County Court, York), that the bill of sale and chattel mortgage were not open to objection as being given direct to the wife by the husband; and that even if her title under the chattel mortgage could not be supported for want of a sufficient change of possession, she could claim under the bill of sale, which being obtained by pressure was not a fraudulent preference under R. S. O. c. 118. *Totten v. Bowen*, 8 A. R. 602.

Held, in this case, that inasmuch as the mortgagor was coerced into making the second mortgage, the making of such mortgage could not be regarded as a fraudulent preference. *Tidey v. Craib*, 4 O. R., Chy. D. 696.

III. BY MARRIAGE SETTLEMENT.

1. Before Marriage.

The defendant B., who was carrying on a thriving business, and possessed of personal property to the value of about \$1,000, his debts not exceeding half that sum, in 1876 bought some land which he had conveyed to his wife, who had been instrumental in increasing the earnings of her husband. It was shewn that all debts due by B. at the time of the settlement had been paid before the institution of this suit by the plaintiff, whose debt had accrued after this conveyance :—Held, under the circumstances, that the plaintiff was not in a position to impeach the conveyance, as it had not been made with a view of placing the property beyond the reach of future creditors. *Collard v. Bennett*, 28 Chy. 556.

In 1877, B., being in difficulties, could not obtain credit. In 1878 the debt to the plaintiff was contracted, and in the same year B. made additions to the house on the land, which he paid for :—Held, that in respect of the moneys so expended, the case came within the principle of *Jackson v. Bowman*, 14 Chy. 156. *Id.*

In November, 1876, a marriage being contemplated between the defendant and M., the defendant's father proposed that M. should erect a house, which he had intended building, on a lot belonging to the father, who agreed to convey the same to his daughter as a marriage portion. This M. assented to, and in that month the marriage took place. During the year following M. built the house, and his father-in-law conveyed the lot to the defendant as had been previously agreed upon. In January, 1880, M. became insolvent, and proceedings were taken by his assignee to have the transaction declared fraudulent as against creditors, under the 132nd section of the Insolvent Act, 1875; or under the 13th Elizabeth, c. 5 :—Held, (affirming the decree of Proudfoot, V.C., 27 Chy. 483,) that no fraudulent intention was shewn on the part of M., and any knowledge by the defendant or her father was distinctly negatived by the evidence, and therefore the transaction could not be impeached under either statute. *Jackson v. Bowman*, 14 Chy. 156, remarked upon, distinguished and approved of. *Davidson v. Maguire*, 7 A. R. 98.

See *Boustead v. Shaw*, 27 Chy. 280, p. 303. See also *Hillock v. Button*, 29 Chy. 490.

2. After Marriage.

S., a wholesale merchant, upon the treaty for marriage with the defendant, and at her suggestion, verbally agreed to make provision or settlement for her benefit, and proposed the purchase of a particular property for that purpose. Subsequently, and after the marriage had taken place, which was in 1870, the property referred to was sold, but producing a larger sum than was anticipated, S. did not buy. Afterwards, and between the 9th of April, 1872, and the 10th of June, 1873, S. purchased amongst other properties four several parcels of land, for the alleged purpose of the proposed settlement, which, with the improvements put thereon, amounted to \$15,320, or thereabouts; some of the conveyances of which it was alleged were in error taken to S. himself, who, two years afterwards, conveyed the same in trust for his wife, but the deed was not registered until three years after its date. S. subsequently became insolvent, and on a bill filed by the assignee of his estate impeaching the conveyance in trust as a fraud upon creditors, the court (Proudfoot, V. C.) being satisfied that an agreement, though verbal, had been made by the parties prior to the marriage, although the only evidence thereof was that of the parties themselves, and that the conveyances of the parcels to S. had been so made by mistake, declared the defendant entitled to hold the lands in settlement, and dismissed the bill, with costs. It was alleged that S. was indebted at the time of the settlement, but upon the evidence set out in the report of this case, it was held that this was not shewn, and that the entry of some of the property in the business books of S. as an asset did not, under the circumstances shew that it remained his property. *Boustead v. Shaw*, 27 Chy. 280.

One of the members of a trading firm, in March, 1875, effected a voluntary settlement on his wife of land on which he had erected a dwelling house at an expense of \$3,000, and in July following the firm were compelled to effect a compromise of their liabilities, and finally, in February, 1877, became insolvent. The plaintiff was appointed their assignee, and thereupon filed a bill impeaching the settlement as having been made, while insolvent, with a view of defrauding creditors. There was no evidence that any debt due at the time of making the settlement was unpaid at the date of the insolvency. Under these circumstances the court, on rehearing, reversed a decree of Proudfoot, V. C., directing the payment of the plaintiff's claim out of the estate remaining after the payment of two mortgages created by the wife and repaying to the wife what, if anything, she had paid on account of the purchase of the land, and dismissed the bill without prejudice to the right to institute proceedings to obtain relief out of any separate estate of the wife. *Darling v. Price*, 27 Chy. 331.

The defendant F. was married in 1849 without any settlement. He was appointed and acted as executor of the estate of his wife's father, and, acting on behalf of his wife, he received large sums from the estate which it was alleged he borrowed from her:—£7,600 before 1859, and £2,800 in 1879; all such moneys being charged to the wife in the books of the estate. The conveyances impeached in this suit were of lands which, with other property, had been purchased

by the husband with the moneys so received on account of his wife, the deeds for which, however, had been taken in the name of F. The mother of his wife had frequently requested F. to settle these properties on the wife, and which he did not object to do, and in 1873, when he with his wife was about to visit Europe, F. did convey the property in question to the wife. In 1872 and 1873 F., jointly with one C., entered into extensive speculations and made a considerable amount of money. In 1873 F. endorsed C.'s note for \$10,000, which C. discounted, and the same remained unpaid, and F. in 1874 gave his cheque to the plaintiff for \$4,000 on which this suit was instituted:—Held, (1) that as to the £7,600, F. having acted for his wife in obtaining this money from her father's estate, and having never made any claim thereto in exercise of his marital right, having borrowed it only, as established by the testimony of the wife's mother, there was no reduction into possession by the husband of the money. (2) And as to the £2,800 the onus was upon the plaintiff to establish a gift to the husband by the wife, which he failed to do; on the contrary, the evidence shewed it to have been a loan. When F. incurred the liability for C., he was in affluent circumstances, and continued to be so for a year after the conveyance impeached in this suit, after which period the liability to the plaintiff was incurred:—Held, that the plaintiff was not, in respect of his own claim, in a position to impeach the conveyance, and could not be in a better position than the prior creditors, who clearly could not have avoided the transaction, the settlement having been made when the settlor in a pecuniary point of view was well able to make it. *Vinden v. Fraser*, 28 Chy. 502.

A husband, not being in debt or engaged in or contemplating engaging in business, bought certain land and stock thereon from one C., the purchase money comprising nearly all the husband's means, and procured C. to make the conveyance and assignment thereof direct to the wife, who had been married to her husband in 1860 without any marriage contract or settlement; and the wife mortgaged the property to the plaintiff. In an interpleader action between the plaintiff and defendants, subsequent execution creditors of the husband, to try the title to the above stock:—Held, that the husband, being in a position to make such voluntary gift or settlement, the conveyance was good: that the property in question was the wife's equitable separate estate, and was not affected by sec. 5 of the Married Woman's Property Act, R. S. O. c. 125, which leaves such settlements untouched. Per Osler, J. The legal ownership of the goods would vest in the husband in his marital right, and to constitute him a trustee for his wife there must be clear and convincing evidence of an intention on his part to make himself such trustee, and divest himself of all title to or interest in the property, and to enable the wife to absolutely dispose of it; while the evidence here merely shewed that, though the goods were formally assigned to her, and she was to have the use and enjoyment of them, the right to alien and dispose of them was to remain in the husband. *O'Doherty v. The Ontario Bank*, 32 C. P. 285. This case is in appeal.

See *Beavis v. Maguire*, 7 A. R. 704, p. 295.

IV. PRACTICE IN SETTING ASIDE.

1. Pleading and Parties.

Where a suit is instituted by a judgment creditor, who has not placed an execution against lands in the hands of the sheriff, in order to set aside a deed as fraudulent, he must sue on behalf of all creditors of the defendant, and the fact that the deed was made by a third party in consideration of money paid by the debtor does not alter the rule of pleading in this respect. *Morphy v. Wilson*, 27 Chy. 1.

The plaintiff filed her bill for alimony, alleging that a conspiracy had been entered into between her husband and the other defendant to prevent her realizing any alimony that might be awarded her, and that for that purpose her husband fraudulently conveyed all his lands to the co-defendant, and the bill prayed to have such conveyance declared fraudulent. The grantee in the impeached conveyance demurred for multifariousness, for want of equity, and want of parties. The Court, (Boyd, C.) over-ruled the demurrer on the first two grounds, but allowed the demurrer for want of parties; the plaintiff not having recovered judgment and execution could only sue in a representative capacity—that is on behalf of herself and all other creditors. *Longeway v. Mitchell*, 17 Chy. 190; *Turner v. Smith*, 26 Chy. 198; *Culver v. Swayze*, 26 Chy. 395, and *Morphy v. Wilson*, 27 Chy. 1, considered and followed. *Campbell v. Campbell*, 29 Chy. 252.

In an action to set aside a conveyance of land as a fraudulent preference the non-avertment that the plaintiff sues on behalf of all other creditors is not ground for demurrer, but a mere informality, to be dealt with under O. J. Act, Rules 103, 104. *Scane et al. v. Duckett et al.*, 3 O. R., Chy. D. 370.

The plaintiffs, A. & J. filed a bill for the purpose of having a deed made to the defendant by J. declared void, as having been obtained by fraud and misrepresentation. The bill alleged that J. had subsequently made a deed of the same property to A., for the purpose of remedying, as far as he could, the wrong he had done by conveying to the defendant—the bill alleging that such deed to A. was made to him “as trustee for the heirs of A. M.,” who had died seized. The bill in no place alleged that A. was trustee, but in the following paragraph it was stated that “before the execution of such last mentioned deed the heirs of the said A. M., who are the rightful owners of the said land,” &c.—Held, that notwithstanding the absence of any express allegation of A. being such trustee, sufficient was stated to shew that he had accepted the office of trustee, and as such was entitled to litigate the subject matters of the bill, and a demurrer for want of equity was over-ruled with costs. *McLean v. Bruce*, 29 Chy. 507.

A demurrer *ore tenus* for misjoinder of plaintiffs, it appearing by the bill that J. had no interest in the questions raised, was allowed, without costs. *Roche v. Jordan*, 20 Chy. 573, followed. *Id.*

The inchoate right of dower at law, obtained by a wife in land conveyed to her husband, makes her a proper party defendant to a suit to set such conveyance aside. *McFarland v. McFarland*, 9 P. R. 73.—Boyd.

2. Costs.

In a suit to set aside a conveyance on the ground of want of consideration, it was alleged that the grantor was bodily and mentally infirm, but the evidence shewed that the only difference between the grantor and grantee was, that the former was an older man than the other. The grantee, however, had given about the full market value of the land conveyed, and to secure part of the purchase money, had executed a mortgage thereon. In dismissing the bill the Court, (Ferguson, J.) directed the costs of the defendant to be deducted from the amount due under the mortgage, if the costs were not paid within a month, it being alleged that the next friend of the plaintiff was worthless. *Travis v. Bell*, 29 Chy. 150.

3. Other Cases.

Although a mortgagee has no right to complain of any subsequent dealing with the estate by the mortgagor, there is nothing to prevent him, if his claim is left unsatisfied from suing on the covenant in the mortgage, and proceeding to a sale under execution or applying to this court to remove any subsequent fraudulent conveyance which interferes with the realization of his claim. *Parr v. Montgomery*, 27 Chy. 521.

P. created three several mortgages on separate portions of his estate, in all about 140 acres, estimated as worth \$6,000, subject to incumbrances amounting to \$3,500 and interest. One of the mortgages was in favour of the defendant M., who subsequently acquired the interests of the other two mortgages. After the creation of these mortgages, P. executed a deed of trust of the whole property in order to defeat a claim of title set up to ten acres by one S. Default was made in payment of M.'s mortgage, who instituted proceedings at law and recovered judgment on which he sued out execution, and under it the sheriff (after the defendant M. had so acquired the other mortgages) proceeded to a sale of the property, which he offered in three distinct parcels, and M. bid for and became the purchaser of all at sums amounting in the whole to \$20. The cestuis que trust thereupon filed a bill to redeem, alleging that the sale to M. had been at a gross undervalue, and praying to have the same set aside; the court, however, refused the relief asked, with costs, being of opinion that the deed of trust was fraudulent, and that the price realized was large, considering that it was a sheriff's sale. *Id.*

A creditor's assignee, not himself a creditor, cannot sustain an action to set aside a fraudulent conveyance or transfer made by the debtor, prior to the assignment under which he claims to be such assignee. *Lumsden v. Scott*, 4 O. R. Chy. D. 323.

FRAUDULENT JUDGMENT.

A man in insolvent circumstances was sued about the same time, by two creditors, one of the plaintiffs being his son. To the one action he entered a defence, while to the other—that brought by his son—he made no defence by reason of which judgment was obtained therein, and

all his effects sold, which were bought in by an agent of the son, the whole realizing less than the debt, interest, and costs. The amount claimed by the son was admitted to be a bona fide debt. The court (Spragge, C.) :—Held, that the refraining from putting in a defence to the action brought by the son was not such a facilitating of his recovering judgment as was prohibited by the statute—(R. S. O. c. 118) in this following *Young v. Christie*, 7 Chy. 317. *Labatt v. Bixel*, 28 Chy. 593. See also *King v. Duncan*, 29 Chy. 113.

The defendant C., defended an action brought against him by the plaintiffs, while in an action brought against him by defendant S., he entered an appearance and filed a plea some days before the plea was due, and on the same day filed a *relicta verificatione*, whereupon judgment was signed and execution issued :—Held, that these proceedings did not offend against the provisions of the Act R. S. O. c. 118, s. 1; following in this the decisions in *Young v. Christie*, 7 Chy. 312; *McKenna v. Smith*, 10 Chy. 40; *Labatt v. Bixel*, 28 Chy. 593; and *Mackenzie v. Watt*, decided in appeal 28th Nov., 1881. *Heaman v. Seale*, 29 Chy. 278.

The defendant, a creditor of O., who was in insolvent circumstances, commenced an action on the 25th May, 1882. By arrangement with O., who appeared, pleaded to the plaintiff's statement of claim, and consented to an order striking out his defence, a judgment was obtained the next day. The plaintiff commenced proceedings immediately after the defendant, and in due course obtained judgment against O., and the validity of the defendant's judgment came in question on interpleader :—Held, following the decisions under R. S. O., c. 118, that the defendant's judgment was valid :—Per Armour, J.—If the matter was *res integra*, O., by actively interfering to enable the defendant to recover a judgment against him sooner than by due course of law he otherwise could have done, was giving a confession of judgment within the words of the Act, and certainly within its spirit. *Turner v. Lucas et al.*, 1 O. R., Q. B. D. 623.

The plaintiff was suing the defendant, F., who was in insolvent circumstances, when the defendant, M., applied to him, and by threats of action to enforce his claim, and a promise to give time to F. if he acceded to his request, induced F. to execute a cognovit whereby M. obtained priority over the plaintiff. Both parties placed writs of execution in the sheriff's hands. Under that at the suit of M., the goods of F. were sold, M. buying part thereof, the price of which he retained on account of his judgment and received the balance from the sheriff :—Held, reversing the judgment of the court below, 3 O. R. 499, that the cognovit was collusive and void under R. S. O. c. 118, s. 1, and the amount realized at the sale by the sheriff was properly applicable to the plaintiff's writ :—Held, also, that a judgment for payment by M. to the plaintiff of the proceeds of the sale could properly be made in this action. *Martin v. McAlpine et al.*, 8 A. R. 675.

Where certain persons who were liable as endorser of certain promissory notes not yet due, knowing the maker's insolvent circumstances, under threat of suit, induced him to give a cognovit actionem, whereon they entered judgment

and issued execution :—Held, not such pressure as exempted the cognovit and subsequent proceedings from being collusive, fraudulent, and void within R. S. O. c. 118. *The Meriden Silver Co. v. Lee et al.*, 2 O. R., Chy. D. 451.

A mercantile firm obtained from their debtor promissory notes for the amount of his indebtedness which notes they endorsed to third parties; before the notes were due and while they were still outstanding in the hands of third parties they applied to the debtor to give a cognovit actionem, knowing at the time that he had recently given a chattel mortgage on his stock in trade and was hopelessly insolvent—and under threat of suit the debtor gave the cognovit, upon which judgment was entered and execution issued :—Held, a fraudulent preference and that the judgment and execution were fraudulent and void under R. S. O. c. 118 :—Held, also, that the transaction could not be supported on the ground of pressure. *Ex parte Hall*, L. R. 19 Chy. D. 580 followed. *Id.*

Twenty-two months after judgment had been signed in an action on promissory notes for want of a plea and execution issued, and the defendant examined as a judgment debtor, leave was refused to set aside the judgment, and amend the declaration by charging the defendant with fraud within the meaning of the Insolvent Act of 1875. *Lightbound v. Hill*, 9 P. R. 295.—Dalton, Master.

[See 47 Vict. c. 10, s. 3, amending R. S. O. c. 118, s. 2].

FREE GRANTS AND HOMESTEADS ACT.

By the R. S. O. c. 24, free grants of lands for homesteads are only authorized to be made to men. *Rogers v. Lovthian*, 27 Chy. 559.

See *Canada Permanent Loan and Savings Co. v. Taylor*, 31 C. P. 41, p. 194.

FRIENDLY SOCIETY.

O. was a member of Court Maple of the defendants' order and was insured under the endowment provisions thereof for \$1,000. This court left the order in a body and joined another order of Foresters, and it was in consequence suspended. On joining the new order it was arranged that O., who was in ill health and had gone to California for change, should be taken and insured with the others. By the rules of the defendant's order members of suspended courts in good standing at suspension were, on application within thirty days to the supreme secretary, and payment of a fee of \$1, to receive a card of membership and be entitled to the endowment, provided they paid all assessments as they fell due, and affiliated with another lodge of the order; but, if after thirty days, they must pass a medical examination. O., on his return from California, on ascertaining that Court Maple had been suspended, within the thirty days, being then in good standing, applied to the defendants' supreme secretary for his card of membership, tendering \$1 and assessments due, which was refused on the ground that a medical certificate was necessary. O., by reason of his not having

the card, was prevented from affiliating though he endeavoured to do so, with another court. By the endowment certificate the \$1,000 was payable to the widow, orphans, or legal heirs of O., and by endorsement thereon O. directed the amount to be paid to the plaintiff, the widow:—Held, that under the directions so given, as well as under R. S. O. c. 167, s. 11, the widow was entitled to recover the amount; and that the fact of O. being a member of another order did not ipso facto deprive him of his rights and membership of defendants' order. *Oates v. The Supreme Court of the Independent Order of Foresters*, 4 O. R., C. P. D. 535.

At the trial an amendment was asked to set up a forfeiture of the policy by reason of O. having gone to California without a permit, which was refused by the judge:—Held, under the circumstances, the refusal was proper. Quære, whether the way, cause, and manner in and for which O. and the other members of Court Maple left it and joined in a body another Order might not, if properly pleaded, have required some consideration. The frame and effect of the pleadings in this case considered. *Ib.*

Members of charitable and provident societies should not be allowed to litigate their grievances within the society in courts of law until they have exhausted every possible means of redress afforded by the internal regulations of their societies. Therefore, where the plaintiff being expelled from the Ancient Order of Foresters, filed his bill for restitution thereto on the ground of illegal expulsion, but it appeared that the rules of the society provided certain internal tribunals to which he might have appealed for redress, but had not, this court refused to interfere. *Easery v. Court Pride of the Dominion*, 2 O. R., Chy. D. 596.

GAMING.

The defendant, being the proprietor of a newspaper, advertised in it that whoever should guess the number nearest to the number of beans which had been placed in a sealed glass jar in a window on a public street, should receive a \$20 gold piece; the person making the next nearest guess, a set of harness; and the person making the third nearest guess, a \$5 gold piece; any person desiring to compete to buy a copy of the newspaper, and to write his name and the supposed number of the beans on a coupon to be cut out of the paper. The defendant was convicted of a contravention of C. S. C. c. 95:—Held, that as the approximation to the number depended as much upon the exercise of skill and judgment as upon chance, this was not a "mode of chance" for the disposing of property within the meaning of the Act. *Regina v. Dodds*, 4 O. R., Q. B. D. 390.

Per Hagarty, C. J. The Act applies to the unlawful disposal of some existing real or personal property. In this case there were no specific gold coins, nor was there any particular set of harness, to be disposed of, which might have been forfeited pursuant to sec. 3 of the Act, and therefore the conviction was bad on that ground. *Ib.*

The defendant was convicted by the police magistrate of the city of Toronto for playing at a game of cards called pharaoh, contrary to the

statute 12 Geo. II. c. 28, and sentenced to pay £50 sterling, the penalty thereby imposed:—Held, that under 27 Geo. III. c. 1, s. 2, the jurisdiction of justices of the peace in such cases was taken away, and in lieu thereof the recovery of such penalty was to be by civil action. The conviction was therefore quashed:—Sembles, per Wilson, C. J., that the defendant could have been convicted under the Municipal Act, 46 Vict. c. 18, s. 49, sub-s. 33, against gambling, and the by-law passed with reference thereto. *Regina v. Matheson*, 4 O. R., C. P. D. 559.

See *Regina v. Goodman et al.*, 2 O. R. 468, p. 189; *Goodman et al. v. Regina*, 3 O. R. 18, p. 189.

GAOL.

Arbitration between city and county as to compensation for care and maintenance of prisoners. See *In re the Arbitration between the Corporation of the City of St. Catharines and the Corporation of the County of Lincoln*, 46 Q. B. 425.

GARNISHMENT.

See ATTACHMENT OF DEBTS—DIVISION COURTS.

GENERAL AVERAGE.

See SHIP.

GENERAL SESSIONS.

See SESSIONS.

GIFT.

The plaintiff had performed services for one P. in his life-time, and he, intending to make some recognition thereof told her that a certain promissory note payable to himself or bearer, which he produced, was hers, saying: "Here is your note: take it when you want it." The plaintiff told him to keep it for her, as she had no place in which to keep it herself, and he did so:—Held, affirming the judgment of the County Court, that this constituted a complete gift inter vivos, there being a gift, and an acceptance of it by the donee, and actual delivery not being necessary as in the case of a donatio mortis causa:—Held, also, that the plaintiff's evidence was, upon the facts stated in the report, sufficiently corroborated. *Watson v. Bradshaw et al.*, 6 A. R. 666.

In administration proceedings the widow of the testator claimed to have received as a gift from her husband a promissory note of one P., made payable to the testator, and not endorsed by him. The widow, it was shewn, had had possession of this, as well as of other notes belonging to the estate, during her husband's lifetime. The only evidence corroborating that of the widow was that of P., who stated that this note was spoken of by the testator as belonging to his wife, that he said he had given it to her, and he hoped he

(P.) would pay it to her when he was able. Evidence in opposition to this was also given:—Held, on appeal from the master at London, that a good gift inter vivos had not been established, and that such note formed part of the general assets of the estate, and the widow was ordered to pay the costs of the appeal. *Re Murray—Purdom v. Murray*, 29 Chy. 443; reversed 9 A. R. 369.

One J. O'B., and B. O'B., his wife, were the holders of a certain deposit certificate of the Bank of British North America to the following purport: "Received from J. O'B. and B. O'B. the sum of \$2,800, for which we are accountable to either, with interest at current rate." &c. Three or four days before his death, J. O'B. called his wife to his bed side, and in the presence of P., gave the certificate to her, saying she was to keep it for her own use, and unequivocally expressing an intention to make an absolute gift of the money to her:—Held, J. O'B. having died, that his wife was entitled to the money in the Bank. *O'Brien v. O'Brien et al.*, 4 O. R., Chy. D. 450.

Held, that the word "bonus" in 36 Vict. c. 48, s. 372, sub-s. 5, Ont. does not necessarily import a gift. See *Scottish American Investment Co. v. Corporation of the Village of Elora*, 6 A. R. 628.

See *Vinden v. Fraser*, 28 Chy. 502, p. 304; *O'Doherty v. Ontario Bank*, 32 C. P. 285, p. 304.

GLENGARRY (COUNTY OF).

Dickinson's Island, on Lake St. Francis, is part of the county of Glengarry. *Regina v. Duquette*, 9 P. R. 29.—Osler.

GOODS.

I. ASSIGNMENT OR MORTGAGE OF—See BILLS OF SALE AND CHATTEL MORTGAGES.

II. LOSS IN CARRIAGE OF—See RAILWAYS AND RAILWAY COMPANIES.

III. SALE OF—See SALE OF GOODS.

GOODWILL

See *Williamson v. Ewing*, 27 Chy. 596, p. 127.

GROWING CROPS.

See CROPS.

GUARANTEE AND INDEMNITY.

I. OPERATION OF THE STATUTE OF FRAUDS, 312.

II. CONSIDERATION, 312.

III. CONSTRUCTION OF CONTRACT.

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2. *Extent of Liability*, 313.

3. *Continuing Guarantee*, 314.

IV. AS BETWEEN PRINCIPAL AND SURETY—
See PRINCIPAL AND SURETY.

I. OPERATION OF THE STATUTE OF FRAUDS.

Where a contractor for the building of a house made default in carrying on the work, and in consequence, the owner, acting under a clause in the contract to that effect, dismissed him, and agreed verbally with a sub-contractor, who had been employed by the contractor, that if the sub-contractor would go on and finish the work he, the owner, would pay him:—Held, that the agreement with the sub-contractor was a new and independent contract, and was not a contract to answer for the debt, default, or miscarriage of another within the fourth section of the Statute of Frauds, and was therefore valid and binding on the owner, although not in writing. *Bond v. Treahy*, 37 Q. B. 360, distinguished. *Petrie v. Hunter et al.*; *Guest et al. v. Hunter et al.*, 2 O. R., Chy. D. 233.

F. being indebted to the plaintiffs, who were pressing him for payment, the defendant signed the following document and delivered it to the plaintiffs in consideration of their giving time to F.: "I will guarantee that the security offered by Mr. John Fleming for the balance of your account will be executed and forwarded within ten days." The security referred to was a mortgage upon real estate to be executed, and a paid-up life policy for \$5,000, which F. had agreed verbally to give to the plaintiffs, neither of which existed at the time of F.'s agreement, or the defendant's guaranty. F. never gave the security, and the plaintiffs, by refraining from suing him, lost their debt:—Held, affirming the judgment of Burton, J. A., Hagarty, C. J. dissenting, that the writing signed by the defendant was not sufficient to satisfy the fourth section of the Statute of Frauds, whether regarded as an original promise or a guaranty. Per Hagarty, C. J. The contract was divisible. The writing was not sufficient as to the mortgage of real estate, because the promise of the debtor himself was not enforceable against him, not being in writing, but as to the policy the writing was sufficient. *Lightbound et al. v. Warnock*, 4 O. R., Q. B. D. 187.

A collateral verbal promise to pay the debt of another, who still remains liable, although founded on a good consideration, is not binding. Therefore where defendant had bought the stock of one A., who was indebted to the plaintiff for wages, and in order to induce the plaintiff to continue with the defendant, the defendant promised to see that he was paid, and the plaintiff did accordingly work for the defendant:—Held, reversing the judgment of the County Court, that the Statute of Frauds was a bar to the action. *James v. Balfour*, 7 A. R. 461.

II. CONSIDERATION.

The defendant, after a note payable to the plaintiff, had become due and while it remained unpaid, endorsed upon it the following words: "I guarantee the payment of the within note to Messrs. T. D. & Co. (the plaintiffs), on demand." The evidence shewed that the consideration for this guarantee was the giving of time to one C., for whose debt to the plaintiff the note was given as collateral security:—Held, that the evidence that the giving of time to C. was the consideration for the guarantee did not contradict the latter, though it was expressed to be "on

demand ;" for these words referred to a demand upon the guarantor after forbearance to press C.; and that such forbearance was a good consideration. *Davies v. Funston*, 45 Q. B. 369.

III. CONSTRUCTION OF CONTRACT.

1. *What Amounts to a Guarantee.*

The plaintiff agreed with M. to repair a boiler in the latter's saw mill. During the progress of the work he received the following letter from the defendant: "As Mr. Morden's saw mill at Bismark is about to come into my hands right away, and as I am to assume the expense of repairs to the boiler, be good enough to push forward the work to be done by you on the boiler as fast as possible; everything at present is at a standstill waiting on you. Please push on the work and oblige yours truly, R. Taylor." The plaintiff, without communicating with the defendant, went on with the work. The defendant's contemplated purchase was not carried out:—Held, that the defendant had not rendered himself liable by the above letter for the price of the work done, and that a nonsuit had been properly entered. *Whitelaw v. Taylor*, 45 Q. B. 446.

D. on the suggestion of R. and the bank of O. that he should purchase certain lumber held by the bank as security for advances made to R. required a guarantee from the bank that the lumber should be satisfactorily culled, and any deficiency paid for by the bank. The directors of the bank thereupon resolved to submit the lumber to a culler, and if he reported satisfactorily, to give the guarantee. The local agent, however, with the approbation of their head manager, without previously employing a culler to report, gave a guarantee in writing, but not under seal, "on behalf of the bank," that the lumber should be satisfactorily culled, previously to shipment:—Held, that the bank was liable on the guarantee for any deficiency resulting from unsatisfactory culling, for the plaintiffs were warranted in assuming that the agent giving it had the necessary authority, and no seal was required; and if the bank wished to repudiate it, they should repay the money paid to them by D. for the lumber:—Held, also that the above guarantee did not come within the description of a guarantee for the act of a third party, for the bank were selling under R. S. O. c. 121, by virtue of being holders of a warehouse receipt for the lumber. *Dobell et al. v. The Ontario Bank et al.*, 3 O. R., Chy. D. 299. Reversed on appeal. See 20 C. L. J. 144.

2. *Extent of Liability.*

Declaration on a guarantee, by which in consideration of the plaintiffs accepting three notes of G. for \$751 each, in satisfaction of their claim against G. & Co., defendant did, "to the extent of \$751, guarantee the payment of the first two of the said notes according to their tenor and effect." Pleas, 1. That the notes were payable to plaintiffs' order, and the plaintiffs endorsed the first note to certain persons who held it at maturity, and to whom in the event of G. not paying it, the plaintiffs were liable as endorsers: that G. notified defendant of his inability to pay it in full, and defendant paid thereon \$276, of which plaintiffs had notice, and afterwards G. failed

to pay the second note, whereupon defendant paid the plaintiffs \$476, being the balance of the sum of \$751 guaranteed by defendant. 2. That the first two notes to the amount of \$1,276, were paid to plaintiffs as they became due, whereby defendant's guarantee was satisfied:—Held, on demurrer, pleas bad; for, as to the first, defendant was not liable to the plaintiffs' endorsees, and no express or implied request by the plaintiffs to pay was shewn: and as to the second the guarantee was not satisfied by the payment of G. of \$751. *Crathern et al v. Bell*, 45 Q. B. 473.

The defendant, in order to enable one G. to carry out a contemplated settlement with the plaintiffs (creditors of G.) signed a memorandum guaranteeing the payment by G. of the first two of three promissory notes of \$751 each, "to the extent of \$751." When the first note to mature fell due G. was unable to meet it, and the defendant, without the knowledge of the plaintiffs or their agents, enabled G. to raise a part of the amount required to retire that note, which amount G. so applied; and this sum the defendant subsequently was compelled to pay:—Held, (affirming the judgment of the Court below, 46 Q. B. 365,) no answer to a claim afterwards made upon the defendant to pay the second note on G.'s failing to do so, the advance which had been so made by the defendant to G. forming no part of the sum the defendant was liable for under his guarantee. *S. C.*, 8 A. R. 537.

3. *Continuing Guarantee.*

On 11th June, 1877, defendant wrote to the plaintiff that J. S., the person he wished to assist, "informs me now that I could help him by pledging myself to you that you might give him a letter of credit in Montreal, and I now say, if you will assist him in that way to \$7000 or \$8000 that I will become responsible to you for the like amount in any manner you may wish &c." J. S. then applied to the plaintiff, who gave a continuing guarantee in his favour to some Montreal merchants, dated 28th August, for goods to the extent of \$500, for three years. At the same time the following note signed by the defendant in blank was filled up by J. S.: "Three years after date I promise to pay to the order of J. S. \$5000 &c." "Value received" To which was added. "This note is given as collateral security for a guarantee of \$5000 given to J. S. by A. S.," the plaintiff. No notice was ever given to defendant of the plaintiff's guarantee, or of the form in which the note was filled in. In an action on the defendant's letter as a continuing guarantee, and on the note. Per Wilson, C. J.—The letter was a guarantee, but not a continuing one, and there could be no recovery under it as the evidence shewed that the amount of \$5000 secured thereby had been paid. Per Galt, J., agreeing with the judgment of Burton, J. A., at the trial, it was not a guarantee, but merely a proposition leading up to a guarantee; at all events if a guarantee it was not a continuing one. *Sutherland v. Patterson*, 4 O. R., C. P. D. 565.

GUARDIAN.

1. OF INFANT—See INFANT.

II. OF LUNATIC—See LUNATIC.

HABEAS CORPUS.

The prisoner was convicted before a County Judge's Criminal Court. On an application for a habeas corpus:—Held, that the court was a court of Record, and that under R. S. O. c. 70 s. 1, there was therefore no right to the writ. *Regina v. St. Denis*, 8 P. R. 16.—Cameron.

The Act 29-30 Vict. c. 45 apparently substituted the right of appeal in habeas corpus cases for successive applications from court to court. *In re Hall*, 8 A. R. 135.

Writ improvidently issued. See *In re Hall*, 32 C. P. 398; *Regina v. Goodman et al.* 2 O. R. 468.

HARBOUR.

See COBOURG HARBOUR.

The soil and bed of the foreshore in public harbours is vested in the Dominion Government. See *Holman v. Green*, 6 S. C. R. 707 p. 124.

HARD LABOUR.

See IMPRISONMENT.

HEALTH.

See PUBLIC HEALTH.

HIGH COURT OF JUSTICE.

I. DIVISIONAL COURT—See DIVISIONAL COURT.

II. TRANSFERRING CAUSES FROM ONE DIVISION OF HIGH COURT TO ANOTHER—See PRACTICE.

A petition against the return of a member for the House of Commons, was filed in the High Court of Justice, Common Pleas Division, constituted by the O. J. Act; and the required security was furnished by the deposit thereon being made in a bank under a direction obtained therefrom from the accountant of the said High Court, appointed under the said Act:—Held, by Cameron, J., that the Common Pleas Division of the said High Court was not one and the same court as the Court of Common Pleas as constituted prior to the passing of the Judicature Act; that the said Court of Common Pleas still existed, and was capable of receiving and trying the said petitions, and therefore, the said Common Pleas Division had no jurisdiction to entertain the same. *Re North York Election Case—Paterson v. Mulock*, 32 C. P. 458, followed in *In re West Huron Election—Mitchell v. Cameron*, 1 O. R. 433. These cases were overruled by the Supreme Court.

The Court of Queen's Bench is an existing court for the presentation and trial of Dominion Controverted Election Cases, notwithstanding the O. J. Act, 1881. *In re Russell Election—Henderson v. Dickinson*, 1 O. R., Q. B. D. 439.

The petition in this case was intituled "In the Queen's Bench, High Court of Justice, Queen's Bench Division," and was delivered without any special instructions to an officer in the office of the Queen's Bench Division, with whom, and in which, the business of the Court of Queen's Bench had formerly been transacted, and the officer entered it in the procedure book of the Queen's Bench Division:—Held, that the words "High Court of Justice Queen's Bench Division" added in intituling the petition might be rejected as surplusage and that the petition had been properly presented in the Queen's Bench. *Id.*

Quære per Armour, J. having regard to the provisions of the Judicature Act, whether the reservation of a case under C. S. U. C., c. 112, to the Justices of the Queen's Bench Division of the High Court of Justice was authorized. *Regina v. Bissell*, 1 O. R., Q. B. D. 514.

Per Patterson, J.A.—By the effect of the Judicature Act a decision of any one division is a decision of the High Court. *In re Hall*, 8 A. R. 135.

Per Armour, J. This court has power to quash a conviction for an illegal adjudication of punishment, although it has been appealed against and affirmed in respect of such adjudication, and 32-33 Vict. c. 31 s. 71 does not take away the certiorari in such a case. *McLellan v. McKinnon*, 1 O. R., Q. B. D. 219.

Held, affirming the judgment of Armour, J., that where a garnishee does not file a notice disputing the jurisdiction of a Division Court within the time required by 43 Vict. c. 8, s. 14, O., though no objection can be taken to this jurisdiction of the Division Court in that Court, the jurisdiction of the High Court of Justice to prohibit the proceedings is not ousted. *Clarke v. Macdonald—Flatt and Bradley, Garnishees*, 4 O. R., Q. B. D. 310.

HIGH SCHOOLS.

See PUBLIC SCHOOLS.

HIGHWAY.

See WAY.

HIRING.

I. OF EMPLOYEES—See MASTER AND SERVANT.

II. OF CONVEYANCES OR ROOMS AT ELECTIONS—See PARLIAMENT.

HOMESTEADS ACT.

See FREE GRANTS AND HOMESTEADS ACT.

HOTCHPOT.

A secured creditor need not bring his security into hotchpot as a condition precedent to ranking

on the estate of a deceased person, his lien being expressly preserved by the Act, R. S. O. c. 107, s. 30. *Chamberlen v. Clark et al.*, 1 O. R., Chy. D. 135.

HURON COLLEGE.

See *Marsh v. Huron College*, 27 Chy. 605, p. 146.

HUSBAND AND WIFE.

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XV. MISCELLANEOUS CASES, 330.

I. ACTION FOR BREACH OF PROMISE OF MARRIAGE.

In an action for breach of promise of marriage it was proved that the defendant, on being charged by the plaintiff's father with having got her in the family way, and having promised to marry her—the plaintiff having been seduced, and had a child by him—replied: "I will marry her if it is mine," and also that he could not do anything until he got some land from his father, when he would marry her. It further appeared that the defendant had admitted some time previously having got fifty acres from his father. There was no proof of an actual promise on the plaintiff's part, but on the cross-examination of the plaintiff's father he stated that before speaking to the defendant about marrying his daughter she had told him she was going to get married to the defendant:—Held, Galt, J., doubting, that there was sufficient evidence of a mutual promise to marry to go to the jury, and a verdict for the plaintiff was upheld. In the first count of the declaration the promise alleged was to marry within a reasonable time; and in the second count on a day now past:—Held, both counts sustainable on the evidence, but especially the second. *Fisher v. Graham*, 31 C. P. 286.

Since 33 Vict. c. 13, Ont., neither of the parties to an action for breach of promise of marriage can be called as a witness by the opposite party. Discovery by means of oral examination under R. S. O. c. 50, s. 156, et seq., substituted for the old practice of administering interrogatories, must be limited to those cases in which the party to be examined is compellable to give evidence by or on behalf of the opposite party, and hence does not apply to actions of this nature. See 45 Vict. c. 10, Ont. *Jones v. Gallon*, 9 P. R. 296.—Osler.

As to examination of parties under R. S. O. c. 50, s. 156. See *Woodman v. Blair*, 8 P. R. 179.

A discharge in insolvency is a bar to a judgment in an action for breach of promise of marriage. See *Forrester v. Thrasher*, 9 P. R. 383; 2 O. R. 38, p. 65.

II. MARRIAGE.

In order to render void a ceremony of marriage, otherwise valid, on the ground that the man was intoxicated, it must be shewn that there was such a state of intoxication as to deprive him of all sense and volition, and to render him incapable of knowing what he was about. *Roblin v. Roblin*, 28 Chy. 439.

Semble:—A combination amongst persons, friendly to a woman, to induce a man to consent to marry her, it not being shewn that she had done anything to procure her friends to do any improper act in order to bring about the consent, would not avoid the marriage. *Ib.*

A marriage entered into while the man is so intoxicated as to be incapable of understanding what he is about is voidable only and may be ratified and confirmed. *Ib.*

Three years after the ceremony of marriage, which the man alleged he had been induced to enter into while under arrest and intoxicated, an action at law was brought against him for necessities furnished to the woman, and for expenses incurred in the burial of her child, in which the validity of the marriage was distinctly put in issue. Before the cause was called on for trial, the man signed a memorandum endorsed on the record in which he admitted the existence and validity of the marriage, and consented to a verdict for the plaintiff in the action:—Held, that if the marriage was previously voidable, it was thereby confirmed. *Ib.*

III. MARRIAGE SETTLEMENTS.

1. *Ante Nuptial.*

The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside. The plaintiff, who had just come of age, being about to marry, applied to her solicitor, who was also her guardian, for advice as to her property, and had several consultations with him, at which the heads of a marriage settlement were agreed upon. The solicitor did not know the husband, and acted solely in the interests of the plaintiff. Nothing was said about a power of revocation in the settlement, which contained the usual clauses, but gave rather more power than usual to the plaintiff, and was made in consideration of marriage:—Held, that it was not a voluntary settlement, and that, as it contained the usual clauses in such deeds, and simply omitted a power of revocation which is not usual in settlements for value, there was no evidence of improvidence, or ground for setting it aside, in the absence of fraud or mistake. *Hillock v. But-ton*, 29 Chy. 490.

The plaintiff, in 1854, being about to marry, conveyed certain lands to trustees—one of whom was her intended husband—upon trust to suffer her to receive the rents, &c., to her own use during her natural life, and upon her death, if she should leave a child or children surviving her, in trust to convey the lands, &c., unto such child or children, their heirs, &c., for ever, freed and discharged of the trust mentioned in the deed; and in case of her death, before her husband, without any child, in trust to permit him to receive the rents, &c., for life, and after his death, or in case he should die before the plaintiff, she leaving no child, then in trust to convey the said lands to her right heirs, freed and discharged from the trusts thereof. The deed gave the trustees power to sell or lease, and also to borrow on the security of the lands. The husband died in 1879, there never having been any child of the marriage, and the plaintiff, who was then fifty-three years old, requested the trustees to reconvey the trust estate to her, which they declined to do without the sanction of the court, as the trust for children was not confined to the issue of the then contemplated marriage, but was wide enough to include the children of any other marriage, but:—Held, as there were no children, and it must be assumed that the plaintiff never could have any children, she was entitled, as equitable tenant in fee simple, to call upon the trustees for a conveyance; the costs of the trustees to come out of the estate. *Farrell v. Cameron*, 29 Chy. 313.

V. WIFE'S PROPERTY, RIGHTS AND LIABILITIES.

[See 47 Vict. c. 19.]

1. *Separate Estate.*

The plaintiff and her husband were married before 1859. In 1870 he, being free from debt, purchased land and had it conveyed to his wife, the plaintiff; who with the rents and profits thereof, she and her husband not living on the land, with money raised by mortgage thereof, and with money borrowed from her sons, purchased the chattels in question herein, which were seized under execution against the husband:—Held, that the chattels were her separate property within the meaning of R. S. O. c. 125, s. 1, and free from the debts of her husband. *Trotter v. Chambers et al.*, 2 O. R., Q. B. D. 515.

Held (reversing the judgment of the County Court of York), that the rents derived by a feme covert, married before 1859, from real estate acquired by her in 1865, were her separate estate. *Horner v. Kerr et al.*, 6 A. R. 30.

The plaintiff, a widow, had, during her coverture, lent the defendants a sum of money which she earned when living apart from her husband, who had never made any claim to this money, or to any of her earnings:—Held, affirming the judgment of the County Court, that the plaintiff was entitled to recover, as the evidence shewed that the husband had acquiesced in her treating her earnings as her separate property; and that C. S. U. C. c. 73, which was in force when the money was lent, in no way abridged the power of the husband to make such a settlement by his acts of acquiescence as well as by a formal writing or distinct words. *Carroll v. Fitzgerald*, 6 A. R. 93.

The plaintiff, who had been married in 1864, cultivated land living upon it with her husband and working it under his advice, one-half of which had in 1874 been devised to her by the father of her husband, the other half having been in like manner devised to her son. In an interpleader action brought by her against an execution creditor of her husband held, affirming the judgment of the court below, 46 Q. B. 52, that the plaintiff was entitled to the crops on the whole farm as against the execution creditor. *Ingram v. Taylor*, 7 A. R. 216.

In January, 1856, R. McC. sold certain real estate to J. McC., his sister, by notarial deed, in which she assumed the qualities of a wife duly separated as to property of her husband, J. C. A. After the latter's death, in 1866, J. McC., before a notary, renounced to the communauté de biens which subsisted between her and her late husband. E. C. K., a judgment creditor of R. McC., seized the said real estate as belonging to the vacant estate of the said R. McC., deceased. J. McC. opposed the sale on the ground that the seizure was made super non domino et possidente, and setting up title and possession. She proved some acts of possession, and that the property had stood for some time in the books of the municipality in her name. E. C. K. contested this opposition on the ground that J. McC.'s title was bad in law, and simulated and fraudulent, and that there was no possession:—Held, that by her renunciation to the communauté de biens, which subsisted between her and her late husband at the date of the deed of January, 1856,

J. McC. divested herself of any title or interest in said lands, and could not now claim the legal possession of the lands under that deed or by prescription, or maintain an opposition because the seizure was super non domino et non possidente. *McCorkill v. Knight*, 3 S. C. R. 233.

See *In re Widmeyer v. McMahon et al.*, 32 C. P. 187, p. 326; *Murray v. McCallum*, 8 A. R. 277, p. 325; *Griffin v. Patterson et ux.*, 45 Q. B. 536, p. 322; *O'Doherty v. The Ontario Bank*, 32 C. P. 285, p. 304; *Siveurwright v. Leys*, 28 Chy. 498.

2. Conveyances affecting Wife's Real Estate.

Where a deed in a chain of title had been made to a husband and wife as joint tenants:—Held, following *Shaver v. Hart*, 31 Q. B. 603, that notwithstanding the terms of the deed the husband and wife took by entireties. And when the husband made a conveyance of the same land in the lifetime of his wife, she merely joining to bar her dower, and she predeceased her husband:—Held, that the husband's deed conveyed the fee. *Re Morse*, 8 P. R. 475.—Blake.

A., a married woman, owning the whole lot, in 1834 by deed jointly with her husband, purported to convey the east half to F. in fee simple. The conveyance was void in not having the proper magistrate's certificate endorsed thereon. F. never took possession, but in 1852 conveyed to H., through whom the plaintiff claimed. Shortly after the conveyance to F., he told A. that he would not live on the land or have anything to do with it. A. then procured some one to look after it for her, and about sixteen years before this action two sons of A. settled upon the west half of the lot upon the understanding that they were to have the whole land, each paying her \$50 on account; but no deed was executed to them till 1875. They paid taxes on the whole lot, and cut timber at times upon the east half. In 1871 E., having obtained a conveyance of the east half, had a line run between the east and west halves and cut timber on the east half. An action of trespass was brought against him by A.'s sons, which he settled. The east half was neither cleared, fenced, nor cultivated:—Held, *Cameron, J.*, dissenting, that those claiming under A. in 1873, when 36 Vict. c. 18, was passed, were not in "actual possession or enjoyment" of the east half contrary to the terms of the conveyance, within the meaning of the proviso at the end of sec. 13 of that Act, and therefore that A.'s conveyance to F., void in its inception, was validated by sec. 12 of the Act (R. S. O. c. 128, s. 13), and the plaintiffs were entitled to recover. Per *Cameron, J.*, the possession of A. and those claiming under her must be construed with reference to her paper title to the land, which remained in her, as her deed to F. was void, and it must therefore be held to have extended to the whole lot and not only to those parts actually occupied as in the case of a trespasser, and therefore the case fell within the exception in the Act, and the deed was not validated thereby. *Elliott v. Brown et al.*, 2 O. R., Q. B. D. 352.

3. Liability on Contracts.

Action against husband and wife for the price of goods supplied in 1877 by plaintiff to the

female defendant, who was married in 1856 without a marriage settlement, and who lived with her husband and family. The husband and wife were devisees in fee of land under a devise to them in 1866, and the sheriff had, in 1874, affected to sell to the wife the husband's interest in the land under an execution against the husband:—Held, that the wife's interest in the land was not such as to entitle the plaintiff to a remedy against it:—Held, also, *Armour, J.*, dissenting, that she was not liable to the plaintiff for the goods sold:—Per *Hagarty, C. J.*—The fact of a woman (living with her husband and family) ordering household goods does not raise an implied personal promise to pay or bind her separate estate, or any other presumption than that she is acting as her husband's agent; and the interest of the husband, being inalienable, was not saleable under execution under R. S. O. c. 66, s. 39. Per *Armour, J.*—(1) That whatever might be the effect of the sheriff's sale, it should be treated according to the effect ascribed to it by the plaintiff's and female defendant's conduct, viz., as having vested the estate in her. (2) That from the evidence it was the fair inference that the claim was the separate debt of the wife, part of it having been incurred by her in respect of the business of farming, in which she appeared to be engaged on her own account; that she had contracted in respect of separate personal estate appearing to be hers, and that the husband's name should be struck out, and a verdict entered for the amount against her. Per *Armour, J.*—Quære, whether the effect of the Married Women's Acts may not be to do away with the estate by entireties, and make husband and wife, when devisees, tenants in common. *Griffin v. Patterson et ux.*, 45 Q. B. 536.

In an action on a promissory note made by the defendant G., a feme covert, married after 2nd March, 1872, without a settlement, and C., her brother, as trustees under their father's will, for the purpose of raising money to pay certain insurances on the trust estate, it appeared that the testator had devised his real estate to his trustees in trust to sell as one B. should deem expedient, and out of the proceeds to pay debts and invest the residue, and to expend the income in the maintenance of the trustee and his other children until the youngest should attain the age of twenty-one, and then equally to divide amongst all the children, the issue of deceased children to represent their parent:—Held, that until the youngest came of age, C. had no separate estate available in execution, and that she was not liable on the note; *Armour, J.*, dissenting, and holding that the true construction of the Married Women's Property Act is impliedly to enable a feme covert to incur debts, to make engagements, and to enter into contracts as if she were a feme sole and that the remedy in respect of any such debts, &c., should be against her personally, and should not depend upon the fact of her ever having had separate estate or not. *Clarke v. Creighton et al.*, 45 Q. B. 514.

The rule of the courts is, that it will not restrain a married woman from dealing with her separate estate pending suit; but, if she die seized thereof, the court will administer her estate for the satisfaction of her debts:—Held, therefore, that the estate of a married woman, deceased, in the hands of her infant heirs, was liable to the

payment of a note on which she was endorser as surety for her husband. *Merchants' Bank v. Bell*, 29 Chy. 413.

The endorser, a married woman, died intestate during the currency of the note, and notice of protest was sent to "James Bell, executor of the last will and testament of M. A. Bell, Perth," and received by the husband, who resided with his children in the house which his deceased wife had occupied. No letters of administration had been granted:—Held, that the notice was sufficient, and the interest of the husband as tenant by the curtesy was directed to be exhausted before resorting to the estate of the children in remainder. The costs of the infant defendants were to be added to the plaintiff's claim, and paid out of the estate if not realized against the husband. *Id.*

Held, per Burton, J., at the trial, that the defendant Catharine, who joined in the note with her husband, the other defendant, was not, under the facts stated, possessed of separate estate, and was therefore not liable, notwithstanding her admission endorsed on the note that the payee had advanced the money on the faith of such separate estate. *Bell v. Riddell et ux.*, 2 O. R., Q. B. D. 25.

In an action against a married woman, married in 1871, on a promissory note made by her, the only property she was proved to have was a right to dower in certain land owned by a former husband. Judgment was entered for the plaintiff for the amount of his claim, with a direction for the recovery of same out of the separate property then and at the date of the making of the note vested in defendant, or in any person in trust for her, with which amount such separate estate was charged. *Wallace v. Hutchison*, 3 O. R., C. P. D. 398.

Quære, per Burton, J. A., whether a married woman can be liable on a joint contract. *Horner v. Kerr et al.*, 6 A. R. 30.

See also next Sub-head.

4. Separate Trading.

Held, that debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf, or separately from her husband, may be sued for as if she were an unmarried woman; that is, without regard to separate estate such as Courts of Equity recognize as that particular class of property. Where therefore, to a declaration on a promissory note made by a married woman she pleaded coverture, and the plaintiffs replied that the note was made in respect of a business in which defendant was employed on her own behalf separate from her husband, but did not allege that she had separate property:—Held, that the replication was good. *Berry et al. v. Zeiss et al.*, 32 C. P. 231.

The plaintiff, a married woman, was married in Cincinnati, Ohio in October, 1878, without any marriage settlement, and not possessed of any separate estate except about \$200. Her husband carried on business there until December, 1878, when he failed, and an assignee was appointed. The plaintiff claimed that she then

purchased the stock from the assignee, and carried on a business, similar to that carried on by her husband, on her own behalf and separately from him. Subsequently she removed to Hamilton, where her husband had previously gone, and the goods which remained unsold were sent to Hamilton, where with them she commenced and carried on, as she claimed, a similar business to that carried on in Cincinnati, purchasing new goods from time to time. Upon an interpleader issue to try her right to these goods as against execution creditors of her husband:—Held, on the evidence set out in the report, that not only did it appear that the business carried on in Cincinnati by the wife was in fact the husband's, but that according to the law of Ohio it must be deemed to be such in the absence of an order of protection, which was the case here: Held, also, that the business subsequently carried on in Hamilton, although \$400 of her money had been put into it, was also in fact the husband's business, though carried on in the wife's name. *Levine v. Clafin et al.*, 31 C. P. 600.

B. told the plaintiff that having failed he was unable to carry on business in his own name, and ordered goods to be shipped to the defendant, his wife, who was carrying on business as a grocer, either on her or his order, the account to be opened in her name. Goods were shipped accordingly upon orders of the husband, and on one order of the defendant, and bills were drawn upon the defendant and accepted by her or in her name by her authority. She had separate estate:—Held, Hagarty, C. J., diss., that the plaintiff was entitled to recover. Per Cameron, J., the defendant was liable, being possessed of separate estate, whether the goods were bought by her or by her husband. In the latter case she would be surety for her husband as acceptor of bills drawn upon her for the price of the goods. Per Hagarty, C. J., the goods were bought by the husband, and the liability was his and not the wife's, her name being used merely to shield him from his creditors, and the plaintiff being aware of this; therefore the defendant was not liable to him. *Hessin v. Baine*, 2 O. R., Q. B. D. 302.

Where a wife had purchased the estate of her husband, who had become insolvent, and thereafter authorized him by power of attorney to manage the same for her, and to make promissory notes in and about the said business:—Held, that notwithstanding the power of attorney the real scope of the husband's agency could be ascertained from any admissible evidence, and there was sufficient to justify a finding that the husband had authority to sign the notes in question which were given to creditors for a debt due before his insolvency. *Cooper et al. v. Blacklock*, 5 A. R. 535.

In order that the property of a married woman who carries on a business for herself may be protected from executions against her husband, it is not necessary that she should live separate and apart from her husband, or that the business should be carried on in a house other than that in which the husband and his wife reside. The plaintiff, who was possessed of a sum of money (about \$300), felt dissatisfied with her husband's management of his business, his goods having been sold under execution for debt whilst residing on a rented farm, the sale not realizing sufficient to pay the arrears of rent

and his debts; leaving, in fact, unpaid the debt for which the defendant in the present action had obtained execution. The husband had literally no means, and the plaintiff resolved to start hotel-keeping, and agreed to give her husband \$15 a month for his services as bar-keeper, the duties of which he discharged, and resided with her in the hotel. It was shewn that whilst thus engaged she had two partners in carrying on the hotel business. The defendant seized the goods in the hotel, and in an interpleader issue a verdict was rendered in favour of the plaintiff, which the court in banc refused to set aside. On appeal to this court:—Held, per Spragge, C. J., and Cameron, J., that the facts shewed the plaintiff to have had a separate trade or occupation within the Act, the husband not having the control of the business, but being hired for a particular duty. Per Burton, J. A., it was not intended that there should be an enquiry under the Act as to the bona fides of such transactions; but that the fact of the husband's interference with the concurrence of the wife, deprived it at once of its separate character. Per Burton and Patterson, J.J. A., that the interference of the husband with the business, as shewn by the evidence, was such in reality as to prevent its being treated as the separate business of the plaintiff. *Murray v. McCallum*, 8 A. R. 277.

VI. DEALINGS BETWEEN HUSBAND AND WIFE

1. Generally.

The widow of the intestate claimed against his estate a sum of \$700, which she alleged he had borrowed from her after her marriage, and about ten years before his death, for the purpose of buying a stock in trade. The money was deposited in a bank at the time of the marriage, which took place before the C. S. U. C. c. 73:—Held, Per Proudfoot, V. C., that the C. S. U. C. c. 73, gave her the right to assert her proprietorship as against her husband, and as incident thereto the right to bring a suit against him; to which proceedings however the Statute of Limitations was a bar. *Re Laws—Laws v. Laws*, 28 Chy. 382.

Where by an agreement before marriage made in Montreal between the intending husband and wife, it was provided that each should enjoy all property, real and personal, which either might possess at the time of, or acquire during the marriage, in any way, as his or her separate property, and should have the absolute control and management thereof free from the debts and demands of the other, and after marriage the wife acquired certain land of which she and her husband executed a mortgage, and the wife conveyed to the husband in fee:—Held, that by the agreement the land was vested in the wife as her proper separate estate, and there was no incongruity in the husband being the grantee of the wife. *Ogden v. McArthur*, 36 Q. B. 246, distinguished. *Sanders v. Malsburg*, 1 O. R., Chy. D. 178.

Semble, that R. S. O. c. 109, s. 2, is retrospective, so as to cast the onus of disproving the payment of the consideration on the party impeaching a conveyance as voluntary, even though the transaction took place prior to that enactment. *Id.*

A. being about to sell a certain property, and in order to induce his wife, B., to bar her dower,

entered into an agreement under seal, that all money to be received as purchase money for the same, as well as all rents received from a certain farm of A.'s should be invested in the joint names of A. and one C., and the income paid over by C., who was authorized to draw the same, to B., "as she may require it for the maintenance of A. and B. and their family:"—Held, a valid agreement, and not opposed to public policy. *Lavin v. Lavin*, 2 O. R., Chy. D. 187.

See *Totten v. Bowen*, 8 A. R. 602, p. 302.

VII. PRIVILEGE OF WIFE FROM ARREST.

See *Metropolitan Loan and Savings Co. v. Mara et ux.*, 8 P. R. 355, p. 36.

VIII. ACTIONS AND SUITS BY AND AGAINST.

1. Wife Suing by Next Friend.

When a married woman filed a bill in respect of property acquired by her after the passing of 35 Vict. c. 16 (the 2nd day of March, 1872), she is not, though married before that date, required to sue by a next friend. Leave was given to strike out the name of a next friend, where one had been named by mistake, and an order had been obtained requiring security for costs. *Shelley v. Goring*, 8 P. R. 36. Stephens, Referee.—Spragge.

Where a married woman, married before the passing of 35 Vict. c. 16, (2nd March, 1872), files a bill in respect of property, whether acquired before or after that date, she is required to sue by a next friend. *Shelley v. Goring*, 8 P. R. 36, referred to. *Godfrey v. Harrison*, 8 P. R. 272.—Stephens, Referee.

3. Other Cases.

In an action in a Division Court against a married woman on a promissory note, the existence of separate real estate was proved, but no evidence was given of any separate personal estate. Judgment was rendered for plaintiff, the amount thereof to be paid out of the separate property she had when the note was made. Per Wilson, C. J. The Married Woman's Act is complied with by a general judgment or by a general judgment against her separate property, and under such judgment after acquired separate personal property can be followed. Per Osler J. A married woman's separate personal estate, but not her real estate, may be charged and sold under a judgment against her in the Division Court. The omission to prove the existence of such separate personal estate, though it may be urged as a defence, does not affect the jurisdiction. Prohibition was therefore refused. *In re Widmeyer v. McMahon, et ux.*, 32 C. P. 187.

Slander of married women—Special damage. See *Palmer v. Solmes*, 45 Q. B. 15, p. 207.

Held, Armour, J. dissenting, that the evidence of the wife is inadmissible on the prosecution of her husband for refusal to support her under 32-33 Vict. c. 20, s. 25. *Regina v. Bissell*, 1 O. R., Q. B. D. 514.

Held, reversing the judgment of the county court, that notwithstanding R. S. O., c. 125, s.

20, a married woman is still entitled, under 21 Jac. I., c. 16, to bring an action in respect of her separate property within six years after becoming discoverd. *Carroll v. Fitzgerald*, 5 A. R. 322.

The court has no authority to make a personal order against a defendant, a married woman, unless she has separate estate. Where a bill prayed such a personal order but contained no allegation as to separate estate, the order was refused. *G— v. R—*, 9 P. R. 174.—Proudfoot.

Action by husband on behalf of himself and children against a railway company, claiming damages under Lord Campbell's Act for death of wife. See *Lett v. The St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545.

IX. DEED OF SEPARATION.

Semble, that a provision of a deed of separation that the maintenance secured to the wife for life, and her children during their residence with her, should continue notwithstanding a renewal of cohabitation, and that in the event of the parties again separating for any the like causes as induced the first parting, the whole of the provisions of the deed should revive, does not render the deed void, on the ground that it is contrary to the policy of the law, as being a provision for future separation: Therefore, where a deed after reciting an agreement for separation between husband and wife; that she was to have the custody of the children until twelve years old, and that he, in consideration of her releasing her dower in his lands, had agreed to pay her a certain sum for her own and the childrens' maintenance, secured to the wife for her separate maintenance a yearly sum of \$600, and a further yearly sum of \$200 for the maintenance of each of the children so long as they should continue in her custody, and provided, that in the event of a reconciliation taking place the annuity for the wife and allowance for the children should not be thereby defeated or revoked; and in case of any future separation of the parties for any of the same causes (which were such as to justify a separation), the whole of the provisions of the deed should be revived and be in full force:—Held, that such deed, upon a fair construction of it, was not open to objection as providing for a future separation; and, Semble, if it had provided for such separation for the causes mentioned, it would not have been void. *Meredith v. Williams*, 27 Chy. 154.

X. FOREIGN DIVORCE.

Where one obtained a divorce from his wife in a foreign state, in which he was a bona fide domiciled, by proceedings of which notice was served personally on the wife living here, which were not collusive, nor contrary to natural justice, and for adultery on the wife's part:—Held, that entire credit must be given to the foreign divorce in this Province, although the wife at the time of the divorce proceedings resided here, for the domicile of the husband was the domicile of the wife, and the validity of the divorce depended on the law of the domicile of the parties. *Guest v. Guest*, 3 O. R. Chy. D. 344.

Where, in an action for alimony, it appeared that the defendant had, previously to action brought, obtained a divorce from the plaintiff in

M., one of the United States of America, and for that purpose had resided a sufficient period of time in M. to comply with the local law governing divorce, yet that his bona fide domicile, both at the time of his marriage with the plaintiff, which also took place in the United States, and at the time of the said divorce, was Canadian:—Held, that the divorce did not operate in this Province, so as to bar the plaintiff's claim for alimony. The marriage relation cannot be properly regarded as one of mere contract, for the rights, duties, and obligations arising from it are not left entirely to be regulated by the agreements of the parties, but are to a certain extent matters of municipal regulation, and as to them the law of the domicile must be looked to. *Magurn v. Magurn*, 3 O. R., Chy. D. 570. This case is in appeal.

XI. QUARANTINE.

Held, that the right of a dowress to occupy the mansion house during her days of quarantine is not merely a personal right, but that she is entitled to have reasonable and proper attendance and companionship, and an action will therefore lie for the eviction of such companion or attendant. *Lucas v. Knox*, 3 O. R., C. P. D. 453.

XIV. ALIMONY.

1. Writ of Arrest.

Where the plaintiff in an alimony suit obtains a writ of arrest, and the defendant gives bail, and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked paid into court, to be applied from time to time in payment of the alimony and costs: and—Semble, that upon such payment the sureties are entitled to be discharged from their bond. *Needham v. Needham*, 29 Chy. 117.

2. Writ of Ne Exeat.

Where, in alimony suit, the statutory bond under a writ of ne exeat has been given the plaintiff is entitled to have the moneys deposited as collateral security therefor paid into court and applied in discharging arrears of alimony. *Richardson v. Richardson*, 8 P. R. 274.—Proudfoot.—Spragge.

3. Particulars.

The statement of claim in an alimony suit contained the following clause: "The plaintiff alleges and charges adultery on the part of the defendant as a further ground for relief in the premises." The plaintiff was ordered to give particulars of the acts of adultery intended to be proved within a month, and limited to those only at the hearing. In default no evidence to be given under the general charge. Such an allegation, without specifying particulars, is bad. *Rosenstadt v. Rosenstadt*, 9 P. R. 311.—Boyd.

4. When Granted.

(a) Desertion.

In consequence of a wife having disobeyed her husband by visiting at the house of his brother

in-law, the husband, during her absence, put sundry chattels belonging to her outside the dwelling-house, and locked the door:—Held, that this was such an act of exclusion and expulsion by the husband as entitled the wife to a decree for alimony, independently of the fact that during such exclusion of the wife the husband entered into a formal marriage with another woman, with whom he continued to live until after the institution of this suit; and, *Quære*, whether adultery per se by the husband is not a ground entitling the wife to alimony. *Howey v. Howey*, 27 Chy. 57.

(b) *Interim Alimony.*

An application for interim alimony cannot be made until defence is filed, or the time for filing it has expired. *Peck v. Peck*, 9 P. R. 299.—Dalton, *Master*.

A writ was issued in an alimony suit on 27th December, 1882, and served on the 4th January, 1883. The statement of claim was filed 11th April, 1883, and a sittings of the court held on 2nd April, 1883. On the application of the plaintiff on the 15th May, 1883, to the master in chambers, interim alimony was allowed her from the 1st May, 1883, her delay in proceeding not being satisfactorily accounted for. On appeal, Boyd, C., upheld the master's order. *Thompson v. Thompson*, 9 P. R. 526.—Boyd.

Interim alimony was stayed until the plaintiff had produced on oath, books, papers, &c., belonging to her husband, which she had taken with her when leaving his house, and which deprived him of the means of paying it. *Old v. Old*, 9 P. R. 552.—Boyd.

(c) *Costs.*

In a suit by the woman for alimony brought seventeen years after the marriage on the ground of refusal by the man to receive her as his wife, he set up the invalidity of the marriage, but while under examination stated that if it was determined that she was his wife he would receive her as such. The court (Proudfoot, V. C.,) while finding there was a valid marriage directed that upon the defendant undertaking to receive the plaintiff as his wife, the bill should be dismissed; but ordered the defendant to pay the costs between solicitor and client. *Roblin v. Roblin*, 28 Chy. 439.

The plaintiff, during the pendency of a motion for interim alimony, returned to her husband:—Held, that the defendant must pay the costs as between solicitor and client of the plaintiff's solicitor. *Leonard v. Leonard*, 9 P. R. 450.—Dalton, *Master*.

See *Knowlton v. Knowlton*, 8 P. R. 400, p. 156.

5. *Application to Reduce Amount of.*

On an application to reduce the amount of alimony payable by the defendant to the plaintiff, the property of the defendant was variously estimated (lands and personalty) at from \$2,938 to \$6,000, and the evidence of the defendant, when cross-examined upon his affidavit filed by him in support of the motion, being unsatisfactory, the

court, (Ferguson, V. C.,) refused to interfere with the report of the master fixing the amount which had been paid under such report for about eighteen months without objection; but the result of the application was not to be considered conclusive against the defendant on any other motion he should be advised to make. *Holway v. Holway*, 29 Chy. 41.

6. *Other Cases.*

Where in a suit for alimony a decree was obtained and registered in the counties in which the defendant owned lands, pursuant to R. S. O. c. 40, s. 44, and writs of fieri facias against the goods of the defendant had been issued and returned nulla bona, on application by petition, setting forth the facts, an order was made declaring the plaintiff to have a lien upon the lands of the defendant affected by the registration of the decree, and for an immediate sale of the said lands, the proceeds to be paid into court, and applied in payment of alimony. *Forrester v. Forrester*, 9 P. R. 338.—Blake.

Where a suit for alimony was pending, and it was alleged, that an action brought against the husband was so brought for the purpose of defeating the suit for alimony and depriving the wife of her dower, an order was made admitting the wife to defend the action. *Ferris v. Ferris*, 9 P. R. 443. Dalton, *Master*.—Ferguson.

See Sub-head X., p. 327.

XV. MISCELLANEOUS CASES.

A married woman was lessee of certain premises in which her husband sold liquor without a license, contrary to the provisions of R. S. O. c. 181:—Held, that she was liable to be fined under sec. 83 of the Act, although the sale of the liquor took place in her absence. *Regina v. Campbell*, 8 P. R. 55.—Hagarty.

Held, in an interpleader suit, that a married woman was not a proper surety, and time was given to substitute another surety for her. *Mullin v. Pasco*, 8 P. R. 372.—Dalton, Q. C.

When land is taken under authority of legislative provisions similar to Revised Statutes of Nova Scotia (4th Series), c. 36, s. 40, et seq., the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land. *Kearney v. Kean*, 3 S. C. R. 332.

See also, *Foott v. Rice et al.*, 4 O. R. 94.

ILLEGITIMATE CHILD.

See BASTARD.

IMPEACHMENT.

Of County Court Judge—See *Re Squier*, 46 Q. B. 474, p. 167.

IMPOUNDING.

See DISTRESS.

IMPRISONMENT.

I. ARREST.

1. *Generally*—See ARREST.2. *Malicious Arrest*—See MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

II. ATTACHMENT—See ATTACHMENT OF THE PERSON.

III. CA. SA.—See CAPIAS AD SATISFACIENDUM.

IV. FALSE IMPRISONMENT — See MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS—TRESPASS.

V. HABEAS CORPUS—See HABEAS CORPUS.

A county judge has power to imprison in the county judges' criminal court. *Regina v. St. Denis*, 8 P. R. 16.—Cameron.

Held, that imprisonment at hard labour for a year was properly awarded under 38 Vict. c. 47, for maliciously wounding. *Regina v. Boucher*, 8 P. R. 20.—Hagarty.

The conviction adjudged payment of a fine and costs and in default imprisonment;—Held, good and that it was not necessary to order that a distress warrant to compel payment of the fine should be issued before imprisonment. *Regina v. Smith*, 46 Q. B. 442.

Per Armour, J. The general sessions of the peace have no power under 32-33 Vict. c. 31, to amend the sentence in a conviction, as by striking out the part imposing hard labour, but can hear and determine an appeal on the adjudication of guilt only. Hagarty, C. J., inclined to agree, but gave no express decision on this point. *McLellan v. McKinnon*, 1 O. R., Q. B. D. 219.

Per Armour, J. This court has power to quash a conviction for an illegal adjudication of punishment, although it has been appealed against and affirmed in respect of such adjudication; and s. 71 of 32-33 Vict. c. 31 D., does not take away the certiorari in such a case. *Id.*

The conviction awarded imprisonment with hard labour in default of payment of the fine. The sessions amended the conviction by striking out hard labour and awarding imprisonment only in default of distress. The commitment under which plaintiff was confined directed imprisonment at hard labour. Per Cameron, J.—The conviction as amended, which was the only one put in evidence, superseded the original conviction, and in effect quashed it so far as regarded the hard labour; defendant was bound to shew an existing conviction authorizing the commitment, and as he failed to do this, the excess of jurisdiction in awarding hard labour made him liable in trespass; and—Semble, that the award of imprisonment in the first instance under the circumstances in evidence, would also make him so liable. *Id.*

The by-law directed imprisonment only in default of distress. Quære, Per Cameron, J., whether the 32-33 Vict. c. 31, s. 59, would apply so as to enable the justice to commit under it in the first instance upon proper evidence. *Id.*

Per Cameron, J. Quære, whether upon the evidence set out in the report of the case the finding that the plaintiff was not put to hard labour was justified. *Id.*

Held, overruling *Regina v. Allbright*, 9 P. R. 25; *Regina v. Frawley*, 46 Q. B. 153; and *Regina v. Pipe*, 1 O. R. 43, that the legislature of the province has power to impose hard labour in addition to imprisonment. *Regina v. Hodge*; *Regina v. Frawley*, 7 A. R. 246; 9 App. Cas. 117.

The prisoners were convicted and sentenced to one year's imprisonment upon a charge of having defrauded one C. by a game called three card monte:—Held, bad in adjudging the sentence of one year, as the Act 40 Vict., c. 32, D., under which they were committed for trial only authorizes a sentence for any term less than a year. *Goodman et al. v. Regina*, 3 O. R., Q. B. D. 18.

As to power to impose hard labour under the Canada Temperance Act, 1878. See *Regina v. Walsh*, 2 O. R. 206 p. 99.

IMPROVEMENTS ON LAND.

I. IMPROVEMENTS ON TRUST PROPERTY, 332.

II. COMPENSATION FOR IMPROVEMENTS.

1. *Consequent on Unskilful Survey*, 332.2. *Under Mistake of Title*, 333.3. *Under Leases*—See LANDLORD AND TENANT.

III. RIGHT TO THE USE OF IMPROVEMENTS ON STREAMS—See WATER AND WATER COURSES.

IV. RENT PAYABLE BY IMPROVEMENTS—See LANDLORD AND TENANT.

I. IMPROVEMENTS ON TRUST PROPERTY.

The court under special circumstances, allowed money to be expended on improvements on a certain property of a testator who had directed by his will that the rents and profits of all his property should be expended in payment of debts, and in the support of his wife and children until the youngest child should come of age. *Re Bender*, 8 P. R. 399.—Spragge.

See *Re Smith's Trusts*, 4 O. R. 518, p. 234.

II. COMPENSATION FOR IMPROVEMENTS.

1. *Consequent on Unskilful Survey*.

Where S. having purchased a lot of land, employed a public land surveyor to mark out the boundaries of it for him, and the surveyor, by reason of an unskilful survey, included in the lot, as marked out by him, land which should not have been so included, and S. misled thereby, effected improvements upon the land so erroneously included:—Held, on recovery of the said land by the rightful owner, that S. was entitled to compensation for the said improvements, under R. S. O. c. 51, ss. 29, 30. *Plumb v. Steinhoff*, 2 O. R., Chy. D. 614. This case has been appealed.

2. Under Mistake of Title.

Held, reversing the judgment of Galt, J., 31 C. P. 227, that under R. S. O. c. 95, s. 4, which entitles a defendant in ejectment to the value of the lasting improvements made on the land to the extent to which the land has been enhanced thereby, the plaintiff is entitled to an account of the rents and profits to be set off against the value of such improvements. In ejectment it was ordered in Hilary Term, 1879, that a verdict should be entered for the plaintiff, but no execution to issue until the value of the improvements was ascertained and the amount thereof paid to the defendant, and that it be referred to the Master in Chancery at Ottawa, to ascertain such value. The master made his report on the 30th of October, 1879, merely finding the value of the improvements, without making any allowance for the rents and profits. In Easter Term, 1880, the plaintiff moved to refer back the report to the master to make such allowance:—Held, that the reference was to the master as an officer of the court, and that there was nothing in any of the sections of the C. L. P. Act, R. S. O. c. 50, relating to arbitrations, which interfered with the right of the court, under the circumstances, to review the act of their officer, and to send the matter back for his reconsideration. The matter was therefore referred back to the master to make such allowance. Quære, as to when mesne profits may now be recovered in ejectment. Quære, also, whether a reference by consent by rule of court or judge's order is within sec. 205 of the C. L. P. Act. *McCarthy v. Arbuckle*, 31 C. P. 405. See also *S. C.*, *Ib.* 48.

The plaintiff being in possession of property—a flonring mill—of which he believed his wife to be owner in fee as heiress of her father, expended upon it about \$3,253. After her death the father's will was discovered, which gave her a life estate only. Upon a reference to the master, at London, to ascertain the amount of enhancement in value of the property, that officer, on the evidence adduced, found that its value at the death of the testator was \$2,700, and that the value at the date of the report was \$4,500:—Held, that he had, under the circumstances, properly found the enhanced value of the estate by reason of such expenditure to be \$1,800, not \$1,300—although upon a sale under a decree of the court the property had realized \$4,000 only—and further, that the plaintiff was entitled to interest on such enhanced value from the time the money was expended. *Fawcett v. Burwell*, 27 Chy. 445.

The master in ordinary, on appeal from the master at London thought the plaintiff had been charged with rent on the unimproved value; but Proudfoot, V. C., on appeal, reversed this finding, thinking it against the weight of evidence, which he had the same opportunity of judging of as the master in ordinary, who had not seen the witnesses. *Ib.*

Semble, that a forced sale for cash is not a proper mode of determining the amount of the enhancement in value of an estate which has been improved by a person in possession under a bona fide mistake of title. *Ib.*

Where a claimant of certain lands commenced an action of ejectment, in which he afterwards entered a nolle pros., and then, subsequently,

commenced a suit in this court for the recovery of the said lands, and the defendant claimed compensation for improvements made under bona fide mistake of title:—Held, the defendant was entitled to compensation for improvements made before the ejectment action, and for those made between the nolle pros. and the commencement of the second suit, but not for those made during the pendency of the ejectment, or since the commencement of the second suit. *O'Grady v. McCaffray*, 2 O. R., Chy. D. 309.

See also *McGregor v. McGregor*, 27 Chy. 470; *Weaver v. Vandusen*—*Wills v. Agerman*, 27 Chy. 477; *Watson v. Ketchum*, 2 O. R. 237; *Foot v. Rice, et al.*, 4 O. R. 94.

INDECENT ASSAULT.

See CRIMINAL LAW.

INDEMNITY.

See GUARANTEE AND INDEMNITY.

INDIAN LANDS.

The Lignor License Act applies to Indian land under lease from the Crown to a private individual. See *Regina v. Duquette* 9 P. R. 29.—*Osler*.

INDICTMENT.

See CRIMINAL LAW—EXTRADITION.

INDIGENT DEBTORS' ACT.

In an action for seduction, the defendant was arrested under a writ of ca. re., and judgment having been entered against him, a ca. sa. was issued, and he was surrendered by his bail to the custody of the sheriff:—Held, that the defendant was not in custody as a debtor, or on execution, but on mesne process as a wrong-doer, and that he was not entitled to an order for payment of a weekly allowance under the Indigent Debtors' Act, R. S. O. c. 69. *Wheatly v. Sharp*, 8 P. R. 189.—*Cameron*.

Held, that it is within the power of the clerk of the crown in chambers to make an order for the payment of a weekly allowance to a debtor, under the above Act, where it can legally be made. *Ib.*

INFANT.

I. CONTRACTS BY INFANT, 335.

II. ACTIONS AND PROCEEDINGS BY AND AGAINST, 335.

III. GUARDIAN, 336.

IV. CUSTODY OF INFANTS, 337.

V. ADOPTION OF INFANT, 337.

VI. INFANT'S ESTATE.

1. *Money in Court*, 338.
2. *Maintenance*, 338.
3. *Sale of*, 338.
4. *Partition of*—See PARTITION.
5. *Trustees of*—See TRUSTS AND TRUSTEES.

VII. ILLEGITIMATE CHILD—See BASTARD.

VIII. INFANCY AS A BAR TO THE STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS AND SUITS.

I. CONTRACTS BY INFANT.

The plaintiff being at the time an infant, on February 20th, 1878, executed a mortgage in favour of the defendants. The proceeds were chiefly applied in paying off prior incumbrances on the land. The plaintiff came of age on April 19th, 1880. After this date, and with full knowledge of his position, he, on January 10th, 1884, executed another mortgage, with the object of in part paying off the mortgage in question; and, moreover, by certain conversation with an agent of the defendants he admitted his liability under the latter mortgage, nor did he take any steps to disaffirm it until 7th September, 1882. On 30th September, 1882, this action was commenced:—Held, that the mortgage in question was not void, but only voidable, and that the plaintiff's conduct after he came of age amounted to a ratification of it. *Foley v. Canada Permanent Loan and Savings Co.*, 4 O. R., Chy. D. 38.

The rule is now well established, that the deed of an infant is not void ab initio, but voidable, on his attaining majority. If he wishes to avoid it, he must expressly repudiate his contract within a reasonable time after coming of age, otherwise his silence will be held to amount to an affirmation of it. *Ib.*

Seemle, that acts of less moment and significance than are required to avoid the conveyance of a minor, may be sufficient evidence of its ratification. *Ib.*

Seemle, (per Proudfoot, J.) that it must be presumed that an adult who affirms a deed executed by him during infancy, does so with knowledge of his rights, and of his exemption from liability. *Ib.*

Per Boyd, C.—The policy of the law now is generally to allow the infant to suspend his ultimate decision upon questions of benefit or injury, till he is of legal capacity to bind himself as an adult. When he arrives at majority he is clothed with full legal capacity with all its incidents, and, as an adult, has no special protection on the ground of ignorance of the law, and any disaffirmance by him of a deed executed during minority, should only be given effect to on the terms of his restoring to the other party, as far as possible, any benefit obtained by him during minority. *Ib.*

II. ACTIONS AND PROCEEDINGS BY AND AGAINST.

Where there was no evidence to shew that infants had been served with a decree of foreclosure, reserving to them a day to shew cause on attaining their majority, but it was shewn that they had been served with notice of pro-

ceedings under the Quietting Titles Act, proof of service of the decree was dispensed with. *Re Gilchrist*, 8 P. R. 472.—Blake.

A final order of foreclosure should reserve a day for infant defendants to shew cause. Spragge, C., was of opinion that the practice should be changed for the sake of putting an end to litigation and to the evil of having estates tied up for perhaps many years, but refused to change the practice in the present case. *London and Canadian Loan and Agency Co. v. Everett*, 8 P. R. 489.

An administration of an estate in which infants were interested, was made on the mere suggestion of their next friend that it would be for their benefit, without going into the merits of the case between the plaintiff and the defendant, the executor. *Re Wilson—Lloyd v. Tickborne*, 9 P. R. 89.—Proudfoot.

The costs of serving an infant personally who is out of the jurisdiction will not be allowed. The proper method is to obtain a præcipe order appointing a guardian ad litem, under G. O. Chy. 610, and serve him. The official guardian is now by O. J. Act, sec. 66 such guardian. In this case an allowance was ordered to be made if the personal service on the infants had facilitated the official guardian in communicating with them or their relatives. *Rew v. Anthony*, 9 P. R. 545.—Boyd.

In an action of ejectment by mortgagees, on the application of the infant defendants, an order for immediate possession and sale of the mortgage premises was made, with a reference to the master to take the usual accounts, but \$80 was ordered to be paid into court to meet the expenses of the sale. *Western Canada Loan and Savings Co. v. Duan*, 9 P. R. 587.—Armour—rescinding order in *S. C. Ib* 490.

Right of infant partner to restrain sale of partnership property under execution obtained against the co-partner. See *Young v. Huber*, 29 Chy. 49.

See *Ricker v. Ricker*, 27 Chy. 576; 7 A. R. 282.

III. GUARDIAN.

It was provided in a will, (1) That the interest on investments should be paid by trustees for the benefit of certain infants to their guardian appointed by the will, or to such guardian, except the father of the infants, as the court should appoint; and (2) That if the father applied to the court, the trustees were to allow the interest to accumulate and be invested till the infants became of age. The guardian named ceased to act, and after the lapse of two years (notice having been given to the father), it was ordered, (1) That the petitioner, the aunt of the infants, with whom they had lived since the death of their mother, the testatrix, should be appointed guardian; (2) That the petitioner should be paid for the past maintenance of the infants. *Re Heywood*, 8 P. R. 292.—Blake.

Where one brought an action against an executor in this country to recover legacies bequeathed to infants, resident in Minnesota, of whom he had been appointed guardian by a Probate Court of Minnesota, and it appeared that the duties and

powers of guardians under the laws of Minnesota were not greater than those of testamentary guardians, or guardians appointed by a Surrogate Court in this country:—Held, that the money must be paid into court, and not to the foreign guardian. Semble, that the rule might be modified if the sum were small, and the whole, or nearly the whole, were required for the infant's education and maintenance, or other immediate use. *Flanders v. D'Evelyn*, 4 O. R., Chy. D. 704.

See *Rew v. Anthony*, 9 P. R. 545, p. 336. See also *Ricker v. Ricker*, 27 Chy. 576, 7 A. R. 282; *Galbraith v. Duncombe*, 28 Chy. 27.

IV. CUSTODY OF INFANTS.

The mother of a child six years of age, whose father was dead, having re-married, delivered up the child to a cousin for nurture and adoption. No written agreement was made, and the parties differed as to the verbal understanding:—Held, that the court, looking only to the best interests of the child, should refuse to direct its re-delivery to the mother. The fact of the mother having re-married, and having children by both husbands, and that the child would be under the custody of a stepfather, was regarded as one ground for the non-interference of the court. *In re Scott*, 8 P. R. 58.—Osler.

While the undoubted natural right of a father to the custody and guardianship of his child is undisputed, and while the law imputes ability and inclination to the parent to perform his duty to his child, the right is yet founded upon his actual capacity to discharge this duty, and his superior claim to the custody of his offspring may be suspended while the incapacity lasts. Under the circumstances of this case, stated in the report, the court refused, on the application of the father, to take the child out of the custody of its grandmother and her brother-in-law. *Re Ferguson*, 8 P. R. 556.—Boyd.

Where the father and mother of a female child under five years of age were living apart, the court refused, under the circumstances stated in the judgment, to take the child out of the custody of the mother, but allowed the father to have access to the child at stated times. *In re Murdoch*, 9 P. R. 132.—Osler.

Custody of illegitimate child. See *In re Smith*, 8 P. R. 23, p. 71.

V. ADOPTION OF INFANT.

Where a father enters into a contract whereby he parts with the custody and control of his child, with the bona fide intention of advancing the welfare of the child, there is nothing in such a contract illegal or contrary to public policy; and although, where such a contract is executory on both sides, the court cannot decree specific performance, by reason of the want of mutuality, yet where the contract has been faithfully performed so far as the father and child are concerned, so that their status has become altered, the court will, if possible, enforce in specie the performance of the contract by the other party to it. Where, therefore, the parents of the plaintiff agreed with H. and his wife to give up to them their daughter, the plaintiff, then

six years old, to bring up as their own, and make her sole heiress to their property at their death, and where it appeared that the agreement was bona fide intended by the father for the ultimate benefit of the plaintiff, and that the plaintiff had remained with H. and his wife for twenty years, rendering them efficient service, and it appeared H. intended her to have his property, and regarded the agreement as binding, so that he considered it unnecessary to make a will:—Held (reversing the judgment of Ferguson, J.,) that the agreement could be enforced against H.'s representative, and that it must be decreed accordingly:—Held, also, (affirming Ferguson, J.,) that inasmuch as, if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered, they would be trustees of the proceeds for her, the plaintiff might maintain the suit in her own name. *Roberts v. Hall*, 1 O. R., Chy. D. 388.

VI. INFANT'S ESTATE.

1. Money in Court.

Payment of money out of court to infants under order made prior to passage of O. J. Act. See *Re Cameron*, 9 P. R. 77.

2. Maintenance.

See *Re Heywood*, 8 P. R. 292, p. 336.

3. Sale of.

Although by the general rule and course of proceeding in mortgage cases the mortgagor is entitled to six months to redeem, before a sale is ordered, the court will, under special circumstances, direct an immediate sale of the property, even as against the infant heirs of the mortgagor. *Swift v. Minter*, 27 Chy. 217.

On a sale of the land of an infant under R. S. O. c. 40, ss. 75-83, an order was made under 44 Vict. c. 14, s. 5, O., barring the dower of the infant's mother, who was a lunatic and confined in an asylum. *Re Colthart*, 9 P. R. 356.—Ferguson.

Interest of infants in land barred by conveyance by mother, who was part owner, to a railway company. See *Dunlop v. The Canada Central Railway Co.*, 45 Q. B. 74.

See also *In re Treleven and Horner*, 28 Chy. 624

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I. FROM COUNTY COURT.

The County Court on its equity side had power to grant an injunction in any case coming within its jurisdiction. The fact of the title to land coming in question did not oust the jurisdiction of the County Court on its equity side. *Rae v. Trim*, 8 P. R. 405.—Taylor, *Master*.

II. TO STAY LEGAL PROCEEDINGS.

A court of equity will restrain a creditor who has obtained an attaching order at law, from enforcing it against a fund recovered by means of a suit in equity to the prejudice of the attorneys' lien for costs in that suit. *The Canadian Bank of Commerce v. Crouch*, 8 P. R. 437.—Osler.

Where on the sale and conveyance of land the existence of an incumbrance is concealed by the vendor, who covenants against incumbrances and the purchaser executes a mortgage to secure a balance of unpaid purchase money, the Court will restrain an action to enforce payment of such mortgage, brought at the instance of the mortgagee—or the voluntary transferee—unless the amount of the incumbrance so concealed is deducted from the sum secured by such mortgage. This principle was applied in a case where the purchaser was a married woman, and her hus-

band had joined in and executed the mortgage, by which he covenanted to pay the amount secured thereby, although the covenant against incumbrances was to the wife and not to the husband, the covenantor, himself. *Lovelace v. Harrington*, 27 Chy. 178.

Proceedings were taken before a county judge to garnish certain moneys, payable by the county to the plaintiff, as clerk of the peace and county crown attorney, and which moneys that judge ordered to be attached in favour of the creditor, the present defendant. Thereupon the debtor, the defendant in those proceedings, filed a bill in this court, seeking to restrain further action on such order:—Held, that this court had no jurisdiction to grant the relief asked; that the proper course to obtain such relief was, by appeal to the Court of Appeal; and, without determining whether the claim of the debtor against the county, was such as could be garnished, the court (Proudfoot, V.C.,) refused the motion for injunction, with costs. *Van Norman v. Grant*, 27 Chy. 498.

The plaintiff who claimed title under a deed, made before, though registered after, the lodging of an execution in the hands of the sheriff was—Held entitled to an injunction to restrain a sale by an execution creditor, of the interest which her co-defendant in the execution would have had in land but for such deed; and she was not bound to attend the sheriff's sale, explain her interest, and protest. *Russell v. Russell*, 28 Chy 419:

The common law right as to the priority of an execution creditor of a lunatic who has an execution in the hands of the sheriff before the lunatic has been declared such, will not be interfered with by injunction restraining him from realizing under his writ. *In re Grant*, 28 Chy. 457.

In a suit by an infant partner against his co-partner praying for dissolution, receiver, reference, &c., after a decree pro confesso, and during the taking of the accounts—under an agreement for a continuance of the partnership business for that purpose—certain creditors of the firm obtained judgments and executions at law against the partner of the infant, who was not informed of these proceedings until the sheriff had seized and was about to sell, the whole of the partnership property:—Held, on motion for injunction, that the proceedings at law were not within the provisions of R.S.O. c. 123, s. 8, and that the sale should be restrained.—Held, also, that the execution creditors might be made parties for that purpose on motion simply. *Young v. Huber*, 29 Chy. 49.

A receiver was appointed under the decree in this suit to collect revenue, and, after paying expenses, to pay the balances into court, which were to be paid out on the report of the master to the parties entitled as found by him. S., pursuant to advertisement for creditors, provided his claim. The master had not made his report. By 44 Vict. c. 61, O., the defendants were authorized to pledge the bonds or debenture stock to be issued thereunder, and the proceeds were to be paid out on the order of C. and F., who were appointed creditors' trustees, in payment of all money necessary to be paid for the discharge of the receiver in this suit. An order of

court was made on the application of the defendants' discharging the receiver without providing for the payment of claimants who had proved under the decree. The Act directed that all who came under it should take fifty cents on the dollar:—Held, that the position of affairs having altered since the time at which S. had proved his claim, he was not bound thereby, and should not be restrained from prosecuting an action for his debt to recover the full amount, if possible. *Lee v. Credit Valley Railway Co.*, 29 Chy. 480.

The defendant, as administratrix of her husband, who lost his life by the foundering of a steamer called the *Waubuno*, belonging to the plaintiffs, on which he was a passenger, sued the plaintiffs to recover damages under R. S. O. c. 128. The plaintiffs, who claimed limited liability under 25 & 26 Vict. c. 63, s. 54 (Imp.) filed a bill under the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 514, (Imp.) to restrain the action, and prayed that it might be determined by the court whether they were liable for loss of life or merchandise, and, if so, for what amount, and the persons entitled thereto:—Held, reversing the decree of Spragge, C., 27 Chy. 346, that the *Waubuno*, not having been registered under 17 & 18 Vict. c. 104, (Imp.) was not a British ship within the meaning of that Act, by virtue of the Statute of Canada 36 Vict. c. 128, and therefore not entitled to take advantage of the limitation clause; and that even if she were, the plaintiffs were not entitled to an injunction, as they did not admit their liability for damages to the extent mentioned in the Act, and bring into court or offer to secure the amount. *The Georgian Bay Transportation Company v. Fisher*, 5 A. R. 383.

See also, *Finn v. Dominion Savings & Investment Society*, 6 A. R. 20.

III. TO RESTRAIN CUTTING AND REMOVING TIMBER.

Held, under the circumstances of this case, that the vendor of standing timber was entitled to an injunction to prevent the cutting and removing of timber by the vendee until payment of the agreed price. See *Summers v. Cook*, 28 Chy. 179.

IV. COMMITTING OR CONTINUING NUISANCES.

I. Offensive Trade.

The defendant was engaged in making boilers and gas receivers, in the manufacture of which it was necessary to join together pieces of iron, about an inch thick, by riveting, which produced noises, continuing from seven in the morning until six o'clock at night, rendering the occupation of the house of the plaintiff's wife, which was only fifteen feet distant, and in which they lived, almost impossible and seriously interfered with her health. Upon a bill filed by the plaintiff, Proudfoot, V. C., 28 Chy. 461, granted an interlocutory injunction restraining the defendant from continuing the boiler-making in such a manner as to be a nuisance to the plaintiff and his premises:—Held, reversing this decree, that the wife was the proper person to file the bill, for as injury to property is the ground of jurisdiction in cases of nuisance, the owner of the

property is the proper party to complain. Quære, whether the husband had any title in the land, and whether his occupancy with his wife was more than permissive on her part. An application made by counsel to add the wife as a party, in order to meet the difficulty, authority having been given by her, was refused on the ground that the suit was not merely, not properly constituted, but that the husband having no locus standi, the suit had no proper existence at all, and another person who had the right could not be substituted for one who had not the right to institute the proceedings:—Held, also, that if the suit had been properly constituted, the court would not have interfered with the discretion of Proudfoot, V. C. in granting the interlocutory injunction. *Hathaway v. Doig*, 6 A. R. 264.

2. Highways and Railways.

An information alleged that the International Bridge Company had constructed and completed the said bridge, and the same was adapted to the passage of railway trains and foot passengers; but that the defendants prevented "persons on foot to cross the said bridge, although willing and offering to pay the lawful tolls provided by the said Act," and that the defendants' intention was "to maintain the said bridge as a railway bridge only, and not as a carriage or foot bridge;" and prayed an injunction to restrain the defendants "from preventing Her Majesty's subjects from using the foot-way of the said bridge at their will and pleasure on the payment of lawful tolls," or preventing them from using in the same manner the foot-paths thereof. The information also prayed the removal of the bridge in the event of its not being constructed in the manner contemplated in the Act of Incorporation. In view of the fact that a large sum of money had been expended in the construction of the bridge so far as it was built, and which had been so built in accordance with the provisions of their Act of Incorporation, the court (Blake, V. C.) allowed a demurrer for want of equity; but, in so far as the information shewed an unlawful exclusion of the public from the use of the foot-paths of the bridge, the demurrer was overruled; but, under the circumstances, without costs to either party. To such an information a railway company who had become lessees of the bridge were held to be proper parties. *The Attorney-General v. The International Bridge Co.*, 27 Chy. 37.

The defendants were a company incorporated by the Dominion Parliament for the construction of a bridge from Canada to the United States, across the Niagara river, which was to be as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains. The company completed the bridge for railway purposes only. The time limited by the charter for the completion of the work having elapsed, an information was filed seeking to restrain the use of the bridge by a railway company to which the bridge had been leased, until put into condition for ordinary traffic, or for the removal of the bridge as a nuisance, and to compel permission of its use by foot passengers on payment of the statutory tolls. The bridge owing, it is said, to engineering difficulties, could not be adapted to the use of carriages and foot

passengers:—Held, reversing the judgment of Spragge, C., 28 Chy. 65, that the abandonment of that portion of the work relating to foot passengers and carriages was not a public nuisance, and the Act of incorporation was not a contract with the public, but merely gave conditional powers creating correlative duties, and was permissive; and that specific performance thereof would not be enforced. *Attorney General v. International Bridge Co.*, 6 A. R. 537.

Held, that the Attorney-General for Ontario, as representing only a limited portion of the public with whom, if at all, such contract existed, had no locus standi. The work being one within the jurisdiction of the parliament of Canada, that parliament, presumably with the knowledge of the state of the bridge, allowed debentures to be issued upon it:—Held, upon this ground also the Attorney-General of Ontario was not the proper party to file the information. *Ib.*

Held, also, that as the bridge extended beyond the limits of the Province, part only being therein, it would be unavailing for the court to give the public the right to pass over that part of the bridge only which was within its jurisdiction; and for this reason also, the court would not interfere. *Ib.*

A municipality may file a bill to compel a railway company to put streets and highway improperly traversed by their line of railway in good repair, and will not be restricted to proceeding by indictment or information. *Fenelon Falls v. Victoria R. W. Co.*, 29 Chy. 4.

The plaintiff, a municipal corporation, filed a bill seeking to restrain the defendants, a railway company, from trespassing by running their track along one of the streets of the municipality without the consent thereof, thus impeding traffic, in contravention of the Railway Act C. S. C. c. 66, s. 12, sub-s. 1:—Held, that by virtue of the Municipal Act there is such power of management, control, &c., bestowed upon municipalities, and such a responsibility cast upon them as to justify them in intervening on behalf of the inhabitants for the preservation of their rights. *Ib.*

Semble, but for the language used in *Guelph v. The Canada Company*, 4 Chy. 656, the proper frame of the suit would have been by way of information in the name of the Attorney-General with the corporation as relators. *Ib.*

V. TO RESTRAIN TRESPASS.

The Ontario, Simcoe, and Huron Railway Company, (afterwards changed to "The Northern Railway of Canada,") in the course of the construction of their roadway, acting in assumed and alleged pursuance of the powers conferred on the company by its charter, entered upon and took possession of certain government lands held by the principal officers of Her Majesty's Ordnance for ordnance purposes, and proceeded to construct their road thereon. Afterwards negotiations were opened between the company and the principal officers for acquiring such right of way, in the course of which numerous letters passed between the parties and between the several departments connected with the ordnance department from which it appeared that the parties

concerned had arrived at the conclusion that the company were acting within their statutory powers, and that all the department could require was, compensation for the land taken. Subsequently all these lands were, by the Imperial government ceded to the government of Canada, and in the year 1875 it was ascertained that the sum for which the government held a lien upon the road amounted to about £600,000; and by an Act of the Legislature of that year that claim was compromised by the government for £100,000 sterling, which was paid. In the year 1856 or 1857, this company agreed with the Grand Trunk Railway Company for the use of a portion of this land for the purposes of the line of the latter company, who it was shewn had entered upon and continued in the use of this land until 1879, when the Credit Valley Railway Company, with a view of obtaining an entrance into the city of Toronto, entered upon this tract of land, and were proceeding to construct their line of road thereon. Upon a bill filed by the Grand Trunk Railway Company an interlocutory injunction was granted to restrain the further construction of the Credit Valley Railway, until the hearing, when the injunction was made perpetual, the court being of opinion that the Northern Railway Company, under their dealings with the Board of Ordnance, and under the various statutory enactments appearing in the case, had acquired an absolute title to the land in question, free from any lien in respect thereof. *The Grand Trunk R. W. Co. of Canada v. The Credit Valley R. W. Co. et al.*, 27 Chy. 232.

VI. TO RESTRAIN EXPROPRIATION OF LAND.

Where the special Act of a railway company incorporated the clauses of the General Railway Act relating to powers, plans, and surveys, and lands and their valuation, and also authorized the company from and out of the ores obtained along their line of railway, to manufacture iron and steel for their own use, and to acquire mining properties by purchase; and the company had chosen a site for a station upon the lands of the plaintiffs, covering a valuable mine of magnetic iron ore, and called upon the plaintiffs to arbitrate, and the plaintiffs were unwilling to part with the land:—Held, that the plaintiffs could not obtain an injunction restraining the company from expropriating the land in question, even though it were conceded that the company knew of the mine, and that it was the property of the plaintiffs, for the Legislature had left the expropriation clauses to their full effect, which, in this country, at least, enables the company to acquire the fee of the land. Aliter, if it were proved that the company were acquiring the land not for the purposes for which the powers were given, but for some collateral object, as for example, with the object of afterwards selling it to a third party. Semble that, if it should afterwards appear that such a scheme was actually in contemplation, and had been carried out, means might be found to frustrate it. *Jenkins et al. v. The Central Ontario R. W. Co.*, 4 O. R., Chy. D. 593.

Semble, that the powers conferred on the court judge under the Railway Act of Ontario, R. S. O. c. 165, s. 20, sub-s. 23, of ordering immediate possession, before arbitration had, do not exclude the jurisdiction of this court to enjoin the taking

of possession, if the company is making use of its powers to attain any object collateral to that for which it was incorporated; but otherwise it is not within the jurisdiction of a judge of this court to interfere with an order of the county judge, though granted *ex parte*. *Ib.*

VII. TO RESTRAIN INFRINGEMENT OF TRADE MARKS.

The principle "on which the court protects trade marks is, that it will not permit a party to sell his own goods as the goods of another; a party therefore will not be allowed to use names, mark, letters, or other indicia, by which he may pass off his own goods to purchasers as the manufacture of another." *McCall v. Theal*, 28 Chy. 48.

The plaintiff, a resident of New York, was engaged in the manufacture and sale of paper patterns, and under what he considered a permission from, or arrangement with the proprietors of an illustrated paper called "Harper's Bazaar," styled such patterns "Bazaar Patterns," which words he registered in the United States and in Canada as his trade mark, and for the purpose of extending his business in this province appointed the defendant his agent for their sale, who for some years acted in that capacity, and subsequently commenced a like business in his own name, calling his patterns by the same name; stating that they were manufactured by "A. M. Theal," while those of the plaintiff were stated to be those of "James McCall & Co."; the defendant, however, using envelopes of the same colour and size, lettered and numbered in precisely the same way, the only perceptible difference being in the name of the alleged agent, which, to casual observers, would readily pass unnoticed. Thereupon the plaintiff filed a bill to restrain the defendant from using the name "Bazaar Patterns," or from otherwise inducing the public to believe that the patterns sold by him were those manufactured by the plaintiff. The court (Blake, V.C.) under the circumstances, thought there was not any exclusive right on the part of the plaintiff to the use of that term; but restrained the defendant from using wrappers similar to those of the plaintiff, or in any other way acting in such a manner as to lead to the belief that the defendant was selling the goods of the plaintiff. The plaintiff, having failed in the main branch of the relief sought—the use of the word "Bazaar"—this relief was granted, without costs. *Ib.*

IX. BREACHES OF COVENANTS OR AGREEMENTS.

The owner of real estate in effecting a sale of a portion thereof covenanted with the purchaser that he would retain a certain square unbuilt upon, with the exception of one residence with the necessary outbuildings including porter's lodge; the purchaser on his part covenanting that he or his assigns would not allow any business of a public nature, such as a tavern, requiring a license to make it allowable in the eye of the law, to be carried on upon the portion conveyed to him. A bill was filed alleging that the vendor and the defendant E. W., who resided with him, were in violation of the covenant erecting a house upon such square not within the exception in the covenant. The bill set forth the

dimensions of the square, and alleged that the same was particularly shewn and delineated on the map of the city of Toronto published in 1857 and was situated between certain named streets:—Held, on demurrer for want of equity, that the square was pointed out with sufficient distinctness, and the fact that it comprised about six acres of land while the portion conveyed to the purchaser was about one-fourth of an acre only, was not such a ground of hardship as would prevent the court from interfering by injunction to restrain the breach of covenant, and E. W. being joined with the vendor in the erection of the house, she could not be heard to say she had not notice of the covenant, and the demurrer was overruled with costs. *VanKoughnet v. Denison et al.*, 28 Chy. 485. See *S. C.*, 1 O. R. 349.

Where the defendants, a railway company, through their right of way agent, purchased certain land for the railway from the plaintiff, and verbally agreed with him at the time to make and maintain certain over and under crossings across the railway to be built on the land so purchased, whereupon the plaintiff conveyed the land to them, for a less sum than he otherwise would have done, and for more than ten years the defendants maintained the crossings as agreed, but afterwards caused some to be filled up or obstructed:—Held, that, whether the agent had authority to make such an agreement or not, the plaintiff was entitled to damages and an injunction to restrain the defendants from interfering with the crossing, for the company had recognized the agreement, and adequate compensation could not be given to the plaintiff in damages, and, moreover, farm crossings, when once made by a railway company, must, under *C. S. O. c. 66, s. 13 et seq.*, which was incorporated in the defendants' charter, be maintained by it, and this independently of any agreement for permanent maintenance, although it is otherwise as to stations. *Clouse v. Canada Southern R. W. Co.*, 4 O. R., Chy. D. 28.

X. BETWEEN LANDLORD AND TENANT.

The plaintiff, in consideration of \$25 paid by defendant, executed in his favour a lease of a small plot of land at a yearly rent of one cent if demanded, with the right on the part of the defendant to remove all buildings at any time during the lease. The lease contained no covenant on the part of the lessee other than those to pay rent and to pay taxes, and it was silent as to any right on the part of the lessee to bore for oil:—Held, that *prima facie*, the lessee had not the right to bore for oil, and having done so and commenced operations in pumping crude oil, an injunction was granted to restrain the further removal of oil from the premises until the hearing of the cause. *Lancey v. Johnston*, 29 Chy. 67.

To prevent removal of fixtures. See *Dickson v. Hunter*, 29 Chy. 73, p. 233.

XI. TO MUNICIPAL CORPORATIONS.

Where, on the petition of the plaintiff and other rate-payers, a township corporation had passed a by-law for the construction of the B drain, and the assessment of the lands to be benefited thereby, part of which the plaintiff owned, but the drain had not been completed,

though a reasonable time had elapsed, and a portion of the moneys assessed had been applied upon a certain other drain, not mentioned in the petition, in the report of the public land surveyor made pursuant to R. S. O. c. 174, s. 529, or in the said by-law, and of no value to the said petitioners:—Held, that the plaintiff was entitled to an order compelling the corporation to complete the B drain according to the by-law, to an injunction to restrain further misapplication of the moneys assessed, and to an account thereof, for that the by-law created a trust which had been violated:—Held, also, that the plaintiff was entitled to maintain the action without the attorney-general. *Smith v. The Corporation of the Township of Raleigh*, 3 O. R., Chy. D. 405.

Held, also, that the fact that the moneys so assessed, were so diverted pursuant to a resolution of the council, passed in accordance with a promise made to certain of the petitioners for the B drain, who signed such petition and submitted to assessment on the faith of such promise, was no justification of such diversion:—Held, lastly, that this was not a case for arbitration, or, at all events, not a case in which the plaintiff was bound to proceed in that manner. *Ib.*

XIII. OTHER CASES.

A notice of motion for partition having been served, the plaintiff moved for an injunction restraining the defendant from collecting rents and for a receiver. It appeared that the defendant was a stranger whose right to be in possession was denied:—Held, that no relief could be had against him without bill filed. *Young v. Wright*, 8 P. R. 198.—Blake.

Where the defendant raised the height of a party wall beyond that of the building of the plaintiff, the adjoining owner, without the latter's consent and subsequently opened a window through the said wall so raised as to overlook the plaintiff's premises:—Held, that by piercing the window defendant had distinctly given notice that he ceased to regard the wall as a party wall, that it was an unauthorized user of the party wall and that plaintiff was entitled to an injunction to restrain the further continuance of such window. *Sproule v. Stratford*, 1 O. R., Chy. D. 335.

XIV. PARTIES TO APPLICATIONS FOR.

1. Wife.

Wife's property. See *Hathaway v. Doig*, 6 A. R. 264, p. 342.

2. Adding Parties.

After decree a party defendant may be added for the purposes of an injunction on motion merely. See *Young v. Huber*, 20 Chy. 49; *Peterkin v. Macfarlane*, *Ib.* 53, note, p. 340.

XV. PRACTICE.

1. Delay in Application for.

The plaintiff was owner of a steam vessel on Lake Couchiching, and accustomed to run into

the River Severn, where it leaves the lake, and to lie in a basin alongside a wharf at Washago. The defendants, in extending their line of railway, constructed a bridge across the river, which completely obstructed the entrance, and caused, it was alleged, special damage to the plaintiff, who was obliged to moor his boat in a basin on the lake side of the bridge, which was somewhat too small for its intended purposes. Some correspondence took place while the bridge was in course of construction, by the plaintiff personally, and through his solicitor with the defendants' general manager, in the nature of protests, but the bridge had been in use for several years without action on the part of the plaintiff, when a bill was filed, praying that it might be declared a nuisance, and that the defendants might be ordered to abate it:—Held, that by the delay in taking action, and otherwise, there had been unequivocal acquiescence in the action of the defendants, and the bill was therefore dismissed, with costs. *Sanson v. The Northern Railway*, 29 Chy. 459.

2. Extending and Continuing.

On a motion to continue an injunction the defendant may bring forward such facts as he might if he were moving to dissolve the injunction, and may shew suppression of facts by the plaintiff as a ground for dissolving it, and may thereupon move to dissolve it. *Hynes et al. v. Fisher et al.*, 4 O. R., Q. B. D. 60.

The plaintiffs individually were members of the Master Plasterers' Association and the defendants individually were members of the Operative Plasterers' Association. The plaintiffs did not by their writ state in what character they sued; but by their affidavits filed professed to represent their association, and joined the defendants as representing the operative association. Some of the defendants by threats, intimidation, and violence, prevented one man, who had contracted to work for one of the plaintiffs, from fulfilling his contract, and induced him to leave Toronto, where he had been hired to work, whereby his master suffered injury to his business:—Held, that this entitled the master to an injunction restraining these defendants from so interfering with his servants. It appeared that previous to the intimidation four workmen had struck work with one W., a member of the plaintiffs' association, because W. had refused to pay one of his workmen the wages demanded for him by them. Thereupon the plaintiffs' association passed a resolution imposing a fine on any of its members who should employ the four striking workmen, and communicated this to the defendants' association. The latter demanded the rescission of the resolution, and notified the plaintiffs' association that in default the workmen would strike. The resolution was not rescinded and the workmen struck. The intimidation complained of by the plaintiffs followed as a consequence:—Held, that the defendants, by shewing the fact of the resolution of the plaintiffs' association, which the plaintiffs had not divulged on their motion *ex parte* for the injunction, which they now moved to continue, were entitled to have the injunction dissolved:—Held, also, upon the merits, that the plaintiffs were not entitled to the injunction on account of their resolution. *Ib.*

An interim injunction will not be granted in aid of a plaintiff, to preserve the subject matter of his action in statu quo long enough to enable him to obtain the decision of an Appellate Court on points already decided in other cases, against his contention, in courts of first instance. *Wylde v. McMaster*, 4 O. R., Chy. D. 717.

A motion by the plaintiff to continue an ex parte injunction was refused, with costs, but at the same time leave was given to amend the bill, and another interlocutory injunction was granted ex parte. On the return of the motion to continue the latter, it was objected that the costs of the former motion which had not been taxed were not paid:—Held, that the non-payment was no objection to the motion being proceeded with. *Taylor v. Hall*, 29 Chy. 101.

The proposed amendments of the bill were set out substantially in the order for the injunction, which was served:—Held, that, as the defendant had thereby notice of the proposed amendments, the objection that the amended bill had not been served was not entitled to prevail. *Ib.*

Where there appeared to be a substantial matter to be tried and no irreparable injury would be done by preserving the subject matter of the suit in medio, an injunction restraining the defendant from dealing with it was continued to the hearing. *Ib.*

3. Other Cases.

On moving for a writ of sequestration for breach of an injunction two clear days notice of motion is sufficient. *Cook v. Credit Valley R. W. Co.*, 8 P. R. 167.—Blake.

An interim injunction was granted, without going into the case, in terms of an undertaking given by the defendants upon a prior return of the motion, that nothing should be done in the meantime. On settling the minutes the Registrar refused to comply with the request of the defendants, by inserting an undertaking on the part of the plaintiffs that the property be retained in the same plight and condition as at the date of the order. A motion was made to vary the minutes by inserting such an undertaking:—Held, that though the undertaking might have been properly asked for on the motion as a condition of granting the injunction, it could not now be exacted, as the effect would be to reverse or alter the order which had been made by arrangement of the parties. As a misunderstanding seemed to have arisen, however, the injunction was stayed for ten days to allow a substantive motion to be made for an injunction restraining the plaintiffs from doing anything detrimental to the property pending the interim injunction. *Hendrie v. Beatty*, 29 Chy. 423.

Section 27 of the Court of Appeal Act, R. S. O. c. 38, does not apply to proceedings by injunction, whether the writ has been issued before or after decree in the cause. *McLaren v. Caldwell*, 29 Chy. 438.

XVI. INTERLOCUTORY INJUNCTION.

The plaintiff, who claimed the exclusive user of certain streams flowing through his lands, which right the defendants denied, obtained an

interlocutory injunction restraining the defendants from using his improvements thereon for floating down their logs, upon the usual undertaking to pay any damages sustained thereby:—Held, reversing the order of Proudfoot, V. C., Armour, J., dissenting, that the plaintiff was not entitled to an interlocutory injunction, as it was not shewn that irremediable damage would result from refusing it, or that the balance of inconvenience was in his favour. Remarks as to the general principles on which interlocutory injunctions should be granted or refused. *McLaren v. Caldwell et al.*, 5 A. R. 363.

The plaintiff and others, councillors of the town of Petrolia, attended a meeting of the council on the 5th April. They were absent at the next meeting called for and held on the 31st May and thenceforward, without authorization, till the 7th of July, when, at a meeting of the council, a resolution declaring their seats vacant and ordering a new election was put, and an amendment to refer the matter to the town solicitor was lost; whereupon the dissentients left the room, in consequence of which there was no quorum, when the original motion was put and carried:—Held, (1) that the three months should be counted from the 31st May, being the first meeting that the plaintiffs had not attended; and that the resolution was therefore void, as well as on the ground that there was no quorum present when it was passed; (2) that the court had jurisdiction to entertain a motion for an injunction restraining the defendants from interfering with the plaintiffs in the exercise of their official duties, and that the injunction might be awarded upon an interlocutory application. *Mearns v. The Corporation of the Town of Petrolia*, 28 Chy. 98.

Upon a conviction for a forcible entry an order for restitution is usually awarded in favour of the party dispossessed, irrespective of the question of title, but where redress is sought by a civil action the title of the plaintiff must be considered, and the court will not generally investigate it upon an interlocutory proceeding, such as an application for an interlocutory injunction. *The Toronto Brewing and Malting Co. v. Blake*, 2 O. R., Chy. D. 175.

The court may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed. Where there are conflicting claimants to the position of president of a company, and one claimant takes forcible possession of the company's premises, the other claimant, at all events when he is at the time the acting president, can bring an action to restrain him in the name of the company, though it be uncertain who is the rightful president. *Ib.*

See *Hathaway v. Doig*, 6 A. R. 264, p. 342; *Wild v. McMaster*, 4 O. R. 717, p. 349.

XVII. CONTEMPT OF INJUNCTION.

See *Hynes v. Fisher—McCord and Jenkins Case*, 4 O. R. 78, p. 37.

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See TAVERNS AND SHOPS.

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I. FIRE INSURANCE.

1. *Calls on Stock after Suspension of License*.

Statement : Call on stock. Defence : That by an order of the Lieutenant-Governor of Ontario in council, issued under 42 Vict. c. 25, the plaintiffs' license had been and still was suspended, whereby it became unlawful for the plaintiffs to do any further business in Ontario ; and that the calls sued for were made for the purpose of enabling the plaintiffs to carry on their business in Ontario :—Held, on demurrer, that the defence should have alleged notice in the *Gazette* of the suspension of the license, pursuant to R. S. O. c. 160, s. 34, and 42 Vict. c. 25, s. 3, sub-s 7 ; but an amendment was allowed, this point not having been taken, and :—Held, that the defence was good, for that bringing an action for calls was transacting business of insurance within the meaning of the above Acts. *Union Fire Ins. Co. v. Lyman*, 46 Q. B. 471.

See *Same Plaintiffs v. Fitzsimmons, and another case*, 32 C. P. 602, p. 150.

2. *Form of Application*.

In the application for insurance prepared by the company there was inserted, in very small type, a notice that the estimated value of personal property and of each building to be insured "must be stated separately," &c., which had escaped the notice of the applicant, and such separate valuations, &c., were not given. The court being of opinion that although this provision might not have been framed in order to elude observation, it was certainly calculated to elude observation, refused to give the insurers the benefit of it, if under the circumstances it would have operated in their favour. *Greet v. Citizens Ins. Co.*, 27 Chy. 121. See *S. C. 5 A. R. 596*.

3. *Authority and Duty of Agent*.

The agent of an insurance company cannot, without the express sanction of his principals, grant an insurance in his own favour binding on the company. And the same principle prevails in the case of a second insurance, although the prior policy had been granted with the express sanction and approval of the company. *White v. The Lancashire Ins. Co.*, 27 Chy. 61.

The defendants executed policies, acknowledging the receipt of the premiums for re-insurances, which their agent at St. John had accepted, and sent them to him for delivery, but afterwards hearing that a loss had occurred, and that the premiums had never been paid, they instructed him not to deliver the policies. The plaintiffs alleged that it was the custom of agents to give each other credit for such premiums, and to settle at the end of the month, when the balance, if any, was handed by one to the other; but no knowledge by defendants of such a course of dealing, nor such a course of dealing on the part of their agents, was proved, and it was shewn that their agents had no authority to re-insure, except upon payment of the premium:—Held, affirming the decree of Blake, V. C., 26 Chy. 561, that the defendants were not liable. Held, also, that even if such a custom had been proved to exist between local agents, it would not be binding on the company, unless authorized by it. Held, also, that the defendants were not under the circumstances bound by their admission on the policy of the receipt of the premium. *Xenos v. Wickham*, L. R. 2 H. L. 396, distinguished. *Western Assurance Co. v. Provincial Ins. Co.*, 5 A. R. 190.

An agent instructed to receive payment for his principal, cannot as a general rule accept anything but money:—Held, therefore, on this principle, and also in view of R. S. O. c. 161, s. 34, and of the fact that the renewal receipt in question in this case contained a notice that it would not be valid unless dated and countersigned by the agent on the day on which the money was paid, that, where in consideration merely of a setting off of debts as between the agent of an insurance company and a policy holder, the former wrongfully delivered a renewal receipt to the latter, the receipt did not bind the company, and the policy lapsed. *Frazer v. Gore District Mutual Fire Ins. Co.*, 2 O. R., Chy. D. 416.

This was an action brought on an interim receipt, signed by one S., an agent for the respondent company at L. One of the pleas was that S. was not respondent's duly authorized agent, as alleged. The general managers of the company for the Province of Ontario had appointed, by a letter, signed by them both, one W., as general agent for the city of L. S., the person by whom the interim receipt in the present case was signed, was employed by W. to solicit applications, but had no authority from, or correspondence with, the head office of the company. In his evidence, S. said he was authorized by W. to sign interim receipts, and the jury found he was so authorized. He also stated that W't., one of the joint general managers, was informed that he (S.) issued interim receipts, and that the former said he was to be considered as W.'s agent. There was no evidence that the other general manager knew what capacity S. was acting in:—Held, affirming the judgment of the Court of Appeal for Ontario, that W. had no power to delegate his functions, and that S. had no authority to bind the respondent company. Per Strong, J., the general agents, being joint agents, could only bind the respondent company by their joint concurrent acts, the appointment of S. as agent by W't. without the concurrence of the other general manager would have been insufficient. *Summers v. The Commercial Union Insurance Co.*, 6 S. C. R. 19.

Assent to assignment. See *McQueen v. The Phoenix Mutual Fire Ins. Co.*, 4 S. C. R. 660, p. 359.

Notice of other insurance. See *Billington v. Provincial Ins. Co., of Canada*, 3 S. C. R. 182, p. 359.

Authority to give time for payment of premium. *Moffatt v. The Mutual Life Assurance Society*, 45 Q. B. 561.

See also *Sowden v. The Standard Fire Ins. Co.*, 5 A. R. 290, p. 356; *Klein v. Union Fire Ins. Co. et al.* 3 O., R. 234, p. 371.

4. Payment of Premiums.

The fire occurred on the 13th of September. On the 15th September, the plaintiff, through a solicitor, paid the amount of an overdue insurance premium note to the defendants, who were ignorant of the loss. On the 17th of September, notice of loss was given to the defendants, when they immediately returned the premium to the solicitor:—Held, that the payment having been made in fraud of the defendants, could not avail the plaintiff. *Sears v. The Agricultural Ins. Co. et al.*, 32 C. P. 585.

See *Frazer v. Gore District Mutual Fire Ins. Co.*, 2 O. R. 416, p. 353; *Neill v. Union Mutual Life Ins. Co.*, 7 A. R. 171, p. 378.

5. Interim Receipts.

The plaintiff was insured by the defendants under an interim receipt, which stated that it was "subject to approval at the head office, and to the conditions of the policy. Unless previously cancelled this receipt binds the company for 30 days from the date hereof, and no longer."—Held, that the conditions of the policy applied to the insurance during the 30 days, and included any variations of the statutory conditions adopted by the defendants. *Compton v. The Mercantile Ins. Co.*, 27 Chy. 334.

See *Citizens Ins. Co. of Canada v. Parsons*; *Queen Ins. Co. v. Parsons*, 7 App. Cas. 96, p. 363.

6. Form of Policy.

Necessity of seal to policy. See *Wright v. The London Life Ass. Co.*, 5 A. R. 218; *S. C. sub nom. London Life Assurance Co. v. Wright*. 5 S. C. R. 466, p. 380.

Printing of statutory conditions. *May v. The Standard Fire Ins. Co.*, 5 A. R. 605, p. 366; *Citizens Ins. Co. of Canada v. Parsons*; *Queen Ins. Co. v. Parsons*, 7 App. Cas. 96, p. 363.

Quære, whether the additional condition in this case was so printed as to comply with the statute. See *Sands v. The Standard Ins. Co.*, 27 Chy. 167; 26 Chy. 116.

Omission to fill up blank in a condition. See *Sears v. The Agricultural Ins. Co. et al.*, 32 C. P. 585, p. 365.

7. Insurable Interest.

A vendor, who has agreed to sell for full value, has nevertheless, pending the contract of sale, a

perfect right to insure the premises sold. If such a vendor insures the premises, describing them as "his," this is no misrepresentation, for pending the contract he remains the legal owner. The fact of the vendor insuring under such circumstances, being an assignee in bankruptcy, makes no difference from the case of an ordinary vendor. *Gill v. The Canada Fire and Marine Ins. Co.* 1 O. R., Chy. D. 341.

The appellants granted a fire policy to one T. on divers buildings and their contents for \$3,280. In his written application T. represented that he was the owner of the premises, while he had previously sold them to S., the respondent, subject to a right of redemption, which right T. at the time of the application, had availed himself of by paying back to S. a part of the money advanced, leaving still due to S. a sum of \$1,510. Subsequent to the application, and after some correspondence, the respective interests of T. and S. in the property were fully explained to the appellants through their agents. Thereupon a transfer for—(the amount being in blank) was made to S. by T. and accepted by the appellants. The action was for \$3,280, the amount of insurance on the buildings and effects:—Held, that at the time of the application for insurance T. had an insurable interest in the property, and as the appellants had accepted the transfer made by T. to S., which was intended by all parties to be for \$1,510, the amount then due by T. to S., the latter was entitled to recover the said sum of \$1,510. 2nd. That S. having no insurable interest in the movables, the transfer made to him by T. was not sufficient to vest in him T.'s rights under the policy with regard to said movables. Art. 2482 C. C. L. C. *The Ottawa Agricultural Ins. Co. v. Sheridan*, 5 S. C. R. 157.

See *Clark v. The Scottish Imperial Ins. Co.*, 4 S. C. R. 192, p. 381; *Klein v. The Union Fire Ins. Co.*, 3 O. R. 234, p. 371.

8. Conditions, Representations, Concealment, Warranty.

(a) Description of Property or Premises.

The plaintiff, describing himself in the application as a grocer, and his store as being used as a grocery, insured with defendants his stock of groceries and patent medicines therein, and without the knowledge or assent of the defendants habitually retailed liquor there; but the jury found that the risk was not thereby increased:—Held, that there was no misrepresentation or concealment of a material fact; that in insuring a "grocery," defendants knew that liquor might be sold there; and that the plaintiff was entitled to recover. *Nicholson v. Phoenix Ins. Co.*, 45 Q. B. 369. (This case has been carried to appeal.)

It was provided, by one of the conditions in the policy sued on, that if any one should insure his building or goods and cause the same to be described otherwise than they really were, to the prejudice of the company, or should misrepresent or omit to communicate any circumstance which was material to be made known to the company in order to enable them to judge of the risk, such insurance should be void. The plaintiff signed a printed form of application in blank for an insurance on a block of five buildings, and told defendants' agent to make his own measure-

ments and description. The agent filled up the application from an examination and diagram which he had made on a previous occasion, and in answer to the question: "Is there any other fact or circumstance affecting the risk with which it is necessary that the company should be made acquainted," replied, "No, it is a first-class building in every respect; although one roof covers all, there is a solid brick fire-wall between each store." The application contained an agreement that if the agent of the company filled up the application, he should, in that case, be the agent of the applicant, and not of the company. There was not a solid brick wall between the stores, and the jury found that this was a misdescription of a fact material to the risk:—Held, affirming the judgment of the Queen's Bench, 44 Q. B. 95, that the plaintiff could not recover. *Souden v. The Standard Fire Ins. Co.*, 5 A. R. 290.

The first statutory condition indorsed on a policy provided that if the insured misdescribed his buildings or goods to the prejudice of the company, or misrepresented, or omitted to communicate any material circumstance, the insurance relating thereto should be void. The second statutory condition provided that the policy was intended to be in accordance with the application unless the company should point out the difference relied on, with a variation added thereto, that such application, or any survey, plan or description of the property to be insured should be considered a part of the policy and every part of it a warranty by the insured, but that the company would not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection. The twentieth statutory condition as varied, provided that in case any agent of the company took part in the preparation of the application, he should, with the exception above provided in case of a diagram or plan, be regarded in that work as the agent of the applicant. By the application, which was signed, not by the insured in person, but through the agent of the company, the insured was required to make known the existence of all buildings within 100 feet of the insured premises; and it appeared that the insured had omitted to make known the existence of a small building used for storing coal oil, and material to be made known, within such distance, but of the existence of which the applicant was not at the time aware. A diagram was made and filled in by the agent and signed by him in his own name as well as that of the applicant, which contained no reference to this building. The diagram was not made from a personal inspection at the time, but from a previous inspection and the knowledge thereby acquired, as also an intimate knowledge of the property, which he passed three times each day, and the agent at the foot of the application stated that he had made a personal survey of the risk:—Held, reversing the judgment of the court below, 31 C. P. 618, that under the conditions and circumstances above set forth the insured was relieved from the effect of his omission to make known the existence of such coal oil shed; that the inspection by the agent need not be one made for the purpose of such insurance, provided a personal inspection did take place; and that under the facts and circumstances appearing in the case the company could not dispute the correctness of the answers given by the insured, whether his answers upon the application for in-

insurance were to be treated as warranties or representations only. *Quinlan v. The Union Fire Ins. Co.*, 8 A. R. 376.

(b) *Statement as to Title and Incumbrances.*

In answer to the questions, "(1) Are the premises occupied by owner or tenant? (2) If by tenant, give name of owner." A party seeking to effect an insurance against fire answered: (1) Tenant—as boarding house. (2) Applicant." And another question (the 11th) was: "If the applicant is the owner of the said building—state the value of the building and land;" and he answered \$600. In fact the applicant did not own the land, having a lease of it which had only a short time to run, with the right to remove the building the subject of insurance:—Held, that this was such a misrepresentation of the interest of the applicant as rendered the policy void under the first of the statutory conditions. *Compton v. Mercantile Ins. Co.*, 27 Chy. 334.

The plaintiff and his brother, being joint owners of land which their father had conveyed to them, subject to a mortgage to C., gave a mortgage to the father to secure the balance of purchase money, the father covenanting to pay C.'s mortgage. Under an agreement with his father and brother, the plaintiff, who was a carpenter, at his own expense, built a dwelling-house for his own use, on a quarter of an acre of the land, the agreement being that, if the brothers should not be able to pay for the land, the plaintiff should have the house as his own. The house was placed on blocks of wood, and was held by its own weight on them. The plaintiff, in his application for insurance on the house and contents, in answer to the question—"Title, held in fee, or how?" answered, "In fee;" and to the question—"Incumbered or not?" If yea, to what amount—how much land does incumbrance cover, and for what purpose erected?" He answered, "None." But he stated to the agent that there was on the land a mortgage, but nothing against the house, which he held in fee unincumbered. There was a condition on the policy that the incumbrance should be disclosed, and that the failure to do so would avoid the policy. The verdict was for the plaintiff:—Held, (Armour, J. dissenting), that the house was not insured as a chattel, but as realty; and that the failure to disclose the incumbrance was fatal. Per Cameron, J., that the house was a fixture, and subject to the mortgage. The condition was, that in case of any misrepresentation or omission to communicate any material circumstance, the insurance should be of no force "in respect to the property in regard to which the misrepresentation or omission is made." Per Cameron, J. The policy was avoided only as to the insurance on the house. The directors passed a resolution to pay the loss, in ignorance of the fact that the incumbrance existed, and made an assessment to meet it, but on discovery rescinded this resolution:—Held, that the defendants had not by the resolution waived their right to set up the defence. Per Armour, J. The house was a chattel, and there was nothing in the application to estop the plaintiff from asserting that it was not insured as part of the land. *Phillips v. The Grand River Farmers' Mutual Fire Ins. Co.*, 46 Q. B. 334.

A fire policy contained a condition, in addition to the statutable conditions, to the effect that if the property were alienated, or any transfer or change of title occurred, or if it were incumbered by mortgage, without the consent of the company, or if the property should be levied upon under process of law, the policy should cease. In answer to the question whether the property was mortgaged, the assured answered "\$5,000 to F. L. & S. Co." There were at the time, in fact, two mortgages to that company, on which \$6,160 were due. After the policy a mortgage was given to secure endorsements, and was discharged, and another was given by the plaintiff to his partners who retired from the firm, but the company was not apprised of either. The jury found that the representations as to incumbrances were false, but not made fraudulently, and a verdict was entered for the defendants:—Held, that the representation as to incumbrances was a violation of the condition, and that the verdict was right. Per Hagarty, C. J. Though that part of the condition as to levying might be unreasonable (5 A. R. 605), the remainder was not, and the condition was divisible. *Wilby v. Standard Ins. Co.*, 3 O. R., Q. B. D. 115.

See *Klein et al. v. The Union Fire Ins. Co. et al.*, 3 O. R. 234, p. 371; *The Ottawa Agricultural Ins. Co. v. Sheridan*, 5 S. C. R. 157, p. 355.

(c) *Assignment, Alienation, or Incumbrance of the Subject insured or the Policy.*

Held, that the usual covenant to insure contained in a mortgage executed under the Act respecting Short Forms of Mortgages, operates as an equitable assignment of the insurance when effected. *Greet v. Citizens Ins. Co.*; *Greet v. Royal Ins. Co.* 5 A. R. 596; 27 Chy. 121.

Held, affirming the judgment of Proudfoot, V. C., 26 Chy. 115 that the fourth statutory condition does not apply to an alienation by way of mortgage, but only to an absolute transfer. *Sands v. The Standard Ins. Co.*, 27 Chy. 167.

The appellant, being indebted to certain persons and desiring to have his stock of goods insured, applied to the agents of respondents for insurance to the amount of \$2,000 for three months, "loss if any to be payable to his creditors of whom G. McK. is one and McM. & Co. are second." An interim receipt was issued by the company, dated 19th of November, 1877, which stated the insurance to be subject to the conditions contained in and endorsed upon the printed form of policy in use by the company, one of which conditions (No. 4) stated, that if the property insured should be assigned without a written permission endorsed on the policy by an agent of the company duly authorized for such purpose, the policy should be void. On the 28th November the appellant transferred the insured property to the said G. McK., in trust for his creditors, the balance, if any, to be payable to himself. The agent of the company was notified of this transfer and assented to it, stating that no notice to the company was necessary, the policy being made payable to the creditors. The property was destroyed by fire on the 15th January, 1878. The policy sued upon was dated the 12th December, 1877, but was not delivered until the morning after the fire. By it the loss

was made "payable to G. McK. and McM. & Co. and others as creditors, as their interests may appear." After the fire the inspector of the company wrote twice to McK. calling for proof of loss:—Held, reversing the judgment of the Court of Appeal for Ontario, 4 A. R. 289,—that the notice of the trust assignment to the company's agent was sufficient, that the company must be considered as having assented to such assignment, and to have executed the policy with full knowledge of it; and that such assignment was not one contemplated by the condition on the policy. 2. That the words "loss payable, if any, to G. McK. & c.," operated to enable the respondents, in fulfilment of that covenant, to pay the parties named; but as they had not paid them, and the policy expressly stated the appellant to be the person with whom the contract and the respondents' covenant was made, the action for a breach of that covenant, was properly brought by him alone. *McQueen v. The Phoenix Mutual Fire Ins. Co.*, 4 S. C. R. 660.

See *May v. The Standard Fire Ins. Co.*, 5 A. R. 605, p. 366.

(d) Prior and Subsequent Insurance.

The plaintiff, desiring to effect further insurance for two months on certain machinery, applied to defendants' company, through one S., their agent at D., authorized to receive applications, accept premiums and issue interim receipts, valid only for thirty days. He informed S. that there were other insurances on the property, but not knowing the amount that there was in the Gore Mutual, requested him to ascertain it, and signed the application partly in blank, paid the premium and obtained an interim receipt, valid only for thirty days. S. failed to do what he promised to do, and what plaintiff had entrusted him to do, and forwarded the application to the head office at T., making no mention of the insurance in the Gore Mutual. The company accepted the risk, and, in accordance with their practice, where the risk extended only over a short period, instead of a formal policy, they issued a certificate, which stated that the plaintiff was insured subject to all the conditions of the company's policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy. The machinery was subsequently destroyed by fire, after the thirty days, but within the two months, and a policy was thereupon issued, endorsed with the ordinary conditions, one of which was that notices of all previous insurances should be given to the company and endorsed on the policy, or otherwise acknowledged by them in writing, or the policy should be of no effect; and another was, that all notices for any purpose must be in writing. The insurance in the Gore Mutual was not endorsed on the policy:—Held, that as the application in writing did not contain a full and truthful statement of previous insurances, the verbal notice to the agent of the existing policy in the Gore Mutual, without stating the amount, was inoperative to bind the company; the plaintiff was not entitled to have the policy reformed by the endorsement of the Gore Mutual policy thereon, and could not recover. *Billington v. Provincial Ins. Co.*, 3 S. C. R. 182; 2 A. R. 158.

Held, upon the evidence set out in these cases, that the policies were avoided by the non-disclo-

sure of a previous insurance. *Greet v. Citizens Ins. Co. Greet v. Royal Ins. Co.*, 5 A. R., 596.

The plaintiff, who was insured in the defendants' company under a policy containing a condition that the "company is not liable * * if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing, signed by a duly authorized agent, effected an insurance with the Mercantile Insurance Company, which was void at their option on account of a similar condition, the policy with the defendant not having expired as a matter of fact, though the plaintiff was led by the agent of the other company to believe it had:—Held, affirming the judgment of the Queen's Bench, 44 Q. B. 490, that the plaintiff could not recover, for the insurance in the Mercantile Company, being not void, but only voidable, was a subsequent insurance within the meaning of the condition. *Gauthier v. Waterloo Mutual Ins. Co.*, 6 A. R. 231.

The appellant sued upon a policy of insurance made by the respondents on the 28th April, 1877. On the face of the policy it appeared that there was "further insurance, \$8,000," and the policy had endorsed upon it the following condition, being statutory condition No. 8, R. S. O., c. 162: "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing signed by a duly authorized agent." Among the insurances, which formed a portion of the "further insurance" for \$8,000 mentioned in the policy, was one for \$2,000 in the Western Insurance Company, which appellant allowed to expire, substituting a policy for the same amount in the Queen Insurance Company, without having obtained the consent of or notified the respondents:—Held, reversing the judgment of the court of appeal for Ontario, 4 A. R. 326, that the condition as to subsequent insurance must be construed to point to further insurance beyond the amount allowed by the policy, and not to a policy substituted for one of like amount allowed to lapse, and therefore the policy sued upon was not avoided by the non-communication of the \$2,000 insurance in the Queen Insurance Company. *Parsons v. The Standard Fire Ins. Co.*, 5 S. C. R. 233.

See *Klein et al. v. The Union Fire Ins. Co. et al.*, 3 O. R. 234, p. 371; *Lowson et al. v. Canada Farmers' Mutual Fire Ins. Co.*, 6 A. R. 612, p. 374.

(e) Alteration of Premises, Increase of Risk, or Change of Occupation.

Where the words in a condition in a policy are, "if the risk be increased or changed by any means whatever," the term "change" must be held to be used rather as a synonym of "increase," than as a word of different signification. *Ottawa Co. v. Liverpool Ins. Co.*, 28 Q. B. 522, approved of. *Gill v. The Canada Fire and Marine Ins. Co.*, 1 O. R., Chy. D. 341.

The plaintiff's premises being insured as "occupied by a tenant as a grocery store and dwelling," were re-let to his son-in-law, who used them for dealing in furniture, and had a small

room behind the shop in which he had a carpenter's bench and tools, and did repairing and rough work. D., the defendant's local agent, was notified of this change, and went on the premises and saw the tenant at work making a desk. He wrote to the head office at plaintiff's request, notifying them of this, and they answered that if the policy were sent, with a letter of explanation, they would consent in writing on it, adding, "Is there woodwork done on the premises?" The matter was then allowed to drop. The policy contained a condition that "any change material to the risk and within the control or knowledge of the assured, shall void the policy as regards the part affected thereby, unless the change be promptly notified in writing to the company or its local agent, and the company so notified may * * * cancel the policy. * * *" The jury were asked whether the change was material, and whether it was fairly communicated to the defendants; and they found for the plaintiff:—Held, that the verdict should not be disturbed. Semble, that the transmission of the policy for endorsement was not essential. *Peck v. Phoenix Mutual Ins. Co.*, 45 Q. B. 620.

The plaintiff having created a mortgage in favour of a loan company, whereby he covenanted to insure the buildings on the property, failed to insure, but assented to an insurance effected by the company in their own name, and repaid them the premium. The premises insured were described as a "two story house, single roofed building * * owned and occupied * * as a steam bending factory." The property having been destroyed by fire, the insurance company paid to the loan company the amount due to them, and took an assignment of their mortgage, whereupon the plaintiff instituted proceedings against the insurance company, seeking to redeem the property on payment of what was due on the mortgage after crediting the amount of insurance. It was shewn that the premises, instead of being used as a steam bending factory, had been converted into a door and sash factory; of which change no notice had been given to the insurance company:—Held, reversing the judgment of the court below, (2 O. R. 39) that the special survey set out in the report in which the intention to use the premises as a factory was mentioned, did not form part of the application or policy and could not be construed as an assent by the defendants to such occupation: that the statutory condition as to change of occupation or use of the buildings without notice to the insurance company had therefore been broken, thus invalidating the policy; and that the plaintiff was not entitled to any benefit thereunder:—Held, also, that the insurance company were at liberty to set up this defence, though between them and the mortgagees the policy was, by a subrogation clause therein made unconditional. *Houes v. The Dominion Fire and Marine Ins. Co.*, 8 A. R. 644.

(f) Danger from Incendiarism.

Action on a fire policy, dated 21st May, 1879, on the ordinary contents of a barn, which was at the time of the insurance empty, and on a reaping and threshing machine. This barn was on the east-half of the lot, the plaintiff's homestead and home buildings being on the west-half, some

distance across the road. In the application for the insurance, dated 13th May, 1879, plaintiff answered "No" to the question, "Is there reason to fear incendiarism, or has any threat been made?" On the same day the plaintiff had obtained another policy from defendants on his dwelling house and home buildings, the same question and answer being contained in his application therefor; and the threshers and reaper in question were then in the home buildings. The fire occurred on the 28th October, 1879. At the trial it appeared that one M., the plaintiff's hired man, about the 8th of May had threatened to beat the plaintiff, and the latter, who was a nervous, timid man, being alarmed, had had the premises insured: that he had sat up and watched for a night, and that he believed the premises had been set on fire. He denied having any reason for fear, except as to his home buildings. At the time of the fire the barn contained some grain and hay, and the threshing and reaping machine, for the loss of which this action was brought. One of the conditions on the policy was, that if the assured misrepresented or omitted to communicate any circumstance material to be made known to the company, in order to enable them to judge of the risk, the policy would be avoided:—Held, *Armour, J.*, dissenting, that the plaintiff could not recover, for the plaintiff having admitted his own belief in the danger and acted upon it, his answer to the above question was untrue. Per *Cameron, J.*—The question was equivalent to "Have you reason to fear, or do you fear, incendiarism?" and though the bodily threat did not furnish valid grounds for believing that incendiarism was to be feared from the person threatening, yet, since the insurance was effected on account of such fear, there was a clear misrepresentation in answering the question; and it made no difference that the property to be covered by the policy was not yet in existence.—Per *Armour, J.* The word "incendiarism" commonly applies to buildings only, and should not be extended in this case to cover personal property. The question should be construed strictly with reference to some particular ground of fear, otherwise the answer "No," referring to the first part only, viz: "Is there reason to fear incendiarism?" would be in every instance untrue; for every insurance is effected because the assured fears the happening of fire by accident, neglect, or design. And the evidence in this case shewed that there was no such reason as, operating on the minds of a majority of prudent men, would cause them to fear incendiarism; and therefore the question was truly answered. The question was also properly answered as to the property covered by this policy, for the fear extended only to the home property; and as to the property intended to be covered by the policy but not then in existence, such as the crops, as to which no fear could exist. *Campbell v. The Victoria Mutual Fire Ins. Co.*, 45 Q. B. 412.

In answer to the question put by one company in an application for insurance on a mill, "Have you any reason to believe that your property is in danger from incendiarism?" and by another, "Have you any reason to suppose that your property is in danger from incendiarism?" the applicant, B., replied to each in the negative. It appeared that the mill had been burnt some months previously, and that the

origin of the fire was unknown; and that threats had been made to B. by one R., an intemperate man, who was accustomed to indulge in threats to which no one paid any attention, to burn down the mill. An anonymous letter had also been received threatening incendiarism. Persons supposed to be tramps had been seen about the premises, and B. had warned the watchman to be careful, and mentioned that he had received the anonymous letter:—Held, reversing the decree of Spragge, C., 27 Chy. 121, that the answers were such a misrepresentation as avoided the policy. *Greet v. Citizens Ins. Co., Greet v. Royal Ins. Co.*, 5 A. R. 596.

The question put by the company in this case was, "Is there any incendiary danger threatened or apprehended?" which B. answered in the negative:—Held, affirming the decree of Spragge, C., 27 Chy. 121, a misrepresentation, which avoided the policy. *Greet v. Mercantile Ins. Co.*, 5 A. R. 596.

(g) Wilful Neglect to Save Property Insured.

Semble, that a fire policy, which is a contract of indemnity, carries with it, even irrespective of conditions to that effect, a provision that the insured shall not, with the fraudulent intention of throwing the loss on the insurer, wilfully cause, or refrain from taking means within his power to prevent, the destruction of the insured property. *Devlin v. The Queen Ins. Co.*, 46 Q. B. 611.

9. Statutory Conditions.

(a) Constitutionality and Application of Act.

As to constitutionality of Act. See *Citizens Ins. Co. of Canada v. Parsons*; *Queen Ins. Co. v. Parsons*, 7 App. Cas. 96, p. 115.

Held, that according to the true construction of the Ontario Act, 39 Vict. c. 24, whatever may be the conditions sought to be imposed by insurance companies, no such conditions shall avail against the statutory conditions, and the latter shall alone be deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the manner prescribed by the Act. The penalty for not observing that manner is that the policy becomes subject to the statutory conditions, whether printed or not. *S. C.*, 7 App. Cas. 96.

Where a company has printed its own conditions and failed to print the statutory ones it is not the case that the policy must be deemed to be without any conditions at all. *Ib.*

An interim note being merely an agreement for interim insurance preliminary to the grant of a policy is not a policy within the meaning of that term in the Ontario Act. "Subject to all the usual terms and conditions of this company" in such note means that such conditions ought to be read into the interim contract to the extent to which they may lawfully be made a part of the policy when issued by following the directions of the statute, subject always to the statutory condition that they should be held to be just and reasonable by the Court or Judge. *Ib.* (See 45 V. c. 20.)

Appellants, a mutual insurance company, issued in favour of J. F., a policy of insurance,

insuring him against loss by fire on a general stock of goods in a country store, and under the terms of the policy, the losses were only to be paid within three months, after due notice given by the insured, according to the provisions of 36 Vict., c. 44, s. 52, O, now R.S.O., c. 161, s. 56, which provides that, in case of loss or damage the member shall give notice to the secretary forthwith, and the proofs, declarations, evidences and examination called for by or under the policy, must be furnished to the company within thirty days after said loss, and upon receipt of notice and proof of claim as aforesaid the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after receipt by the company of such proofs. A fire occurred on the 21st of May, 1877. On the next morning J. F. advised the insurance company by telegraph. On the 29th June, 1877, the secretary of the company wrote to J. F.'s attorneys, that if he had any claim he had better send in the papers, so that they might be submitted to the board. On the 3rd July, 1877, J. F. furnished the company with the claim papers, or proofs of loss, and on the 13th July he was advised that, after an examination of the papers at the board meeting, it was resolved that the claim should not be paid. On the 23rd August, 1877, J. F. brought this action upon the policy. The appellants pleaded *inter alia* that the policy was made and issued subject to a condition that the loss should not be payable until three months after the receipt by the defendants of the proofs of such loss, to be furnished by the plaintiff to the defendants; and averred the delivery of the proofs on the 3rd July, 1877, and that less than three months elapsed before the commencement of this suit:—Held, on appeal. That a policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R.S.O., c. 162. *Ballagh v. Royal Mutual Fire Ins. Co.* 5 A. R. 87, p. 365 approved of. *The Mutual Fire Ins. Co. of the County of Wellington v. Frey*, 5 S. C. R. 82.

(b) Reasonableness of Conditions.

A premium note, dated the 24th May, 1880, given on effecting an insurance with the defendants company, stated that the insured for value received on policy No. 1,305, dated the 6th May, 1880, promised to pay the company \$14.50, on the 24th of December, 1880, with interest at seven per cent., and contained an agreement that if the note were not paid at maturity, the whole amount of the premium should be considered as earned, and the policy should be null and void so long as the note remained unpaid. Upon the policy, which was dated the 14th May, 1880, and took effect from the 24th May, 1880, was endorsed a variation condition that the policy should not be valid or binding until the premium was actually paid, unless credit was given for it, and in that case it was a condition of the contract "that if such premium be not paid — 18 —, the whole amount of premium shall then be considered as earned, and the policy shall be null and void, so long as any part thereof remains unpaid." The application, which was made a part of the policy, stated that the premium was due on the 24th of December, 1880:—Held, that the omission to fill up the blank in the condition,

did not prevent its operating, for the condition would be perfect without the figures "18," which might be rejected as surplusage; but that the condition could be reformed by inserting the words and figures evidently intended—namely, the 24th December, 1880, or might have been filled up by the parties:—Held, also, that the condition was not unreasonable, being in effect the same as that provided for in the case of mutual insurance companies by R. S. O. c. 161. *Sears v. The Agricultural Insurance Co. et al.*, 32 C. P. 585.

Under the statutory conditions indorsed on a mutual fire insurance policy the words, prescribed by sec. 4 of R. S. O. c. 162, except the heading, "Variations in conditions," were printed in ink of a slightly different colour, but in the same sized type, and after certain conditions varying the statutory conditions, and under the heading, "Additional conditions," there was the following condition in type of the same size and colour, "In case any promissory note for a cash premium, or for any premium note * * given to the company, or to any officer or agent thereof, be not paid when due, the policy * * shall be null and void, and the company shall not be liable for any loss occurring either before or after the maturity of such promissory note." The note in this case, payable to defendants' agent or bearer, for \$12, the first payment on the premium undertaking, which was for \$15.62, fell due on the 15th of April, 1878, and the loss, exceeding the amount insured \$500, occurred on the 23rd of March. This note was not paid, the plaintiff alleging that he omitted to pay it, assuming that the defendants would deduct it in settling the loss, which had not been adjusted:—Held, that the Uniform Conditions' Act, R. S. O. c. 162 (excepting sec. 2), does not apply to mutual insurance companies; but that if it did the condition would have been clearly void for non-compliance with sec. 4 of that Act:—Held, also; reversing the judgment of the Queen's Bench, 44 Q. B. 70, that the condition was not just or reasonable, as it was required to be by the express contract, and by sec. 35 of the Mutual Insurance Act, R. S. O. c. 161; and that the plaintiff was entitled to recover. The reasonableness of a condition is to be tested with relation to the circumstances of each case at the time the policy was issued. But quære, per Moss, C. J. A., whether in the abstract such a condition could be regarded as reasonable, and per Patterson, J. A., it could not. Per Patterson, J. A., the condition was also unreasonable, because more stringent than the statutory provisions upon the same subject, sec. 48 of the Mutual Act. Quære, whether this was a note which the company had power to take, or one within the condition. *Ballagh v. The Royal Mutual Fire Insurance Co.*, 5 A. R. 87.

Action on a fire policy, upon which the statutory conditions were not indorsed, but which was on its face declared to be subject to the company's conditions indorsed, the 11th of which was that the insured should do all in his power to save and protect the insured property, and prevent injury thereto. By the 17th condition the non-fulfilment of these conditions entailed the forfeiture of the policy. The jury found specially, amongst other things, that the plaintiff wilfully neglected to save, and prevented others from saving, the insured property, whereby his goods were prevented

from being saved, but they disagreed as to the defence of fraudulent over valuation:—Held, that under the decision of the Privy Council in *Parsons v. Citizens' Ins. Co.*, 7 App. Cas. 96, the policy must be taken to be a policy with the statutory conditions only; and a new trial was granted in order that the case might proceed as upon such a policy. *Devlin v. The Queen Ins. Co.*, 46 Q. B. 611.

Per Burton, J. A.—That a clause in the application, in this case, stating that the agent of the company filling up the application should be regarded as the agent of the applicant was not, by reason of its being made part of the policy, a condition thereof, and subject to the determination of the Judge as to whether it was just and reasonable; and if it were, it was not unreasonable. *Souden v. The Standard Fire Ins. Co.*, 5 A. R. 290.

By a condition in a policy of insurance additional to the statutory conditions, it was provided, that "when property insured * * or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein without the consent of this company indorsed hereon, or if the property hereby insured shall be levied upon, or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding upon the company":—Held, [affirming the decree of Proudfoot, V.C. 26 Chy. 115] that such condition was not just or reasonable, and that it was not binding. *Sands v. The Standard Ins. Co.*, 27 Chy. 167.

By an additional condition of a policy of insurance it was provided that if the insured property should be levied upon, or taken into possession or custody under any legal process, or the title should be disputed in any proceeding in law or equity, the policy should cease to be binding upon the company. After the insurance was effected an execution issued against the goods of the insured, under which the bailiff made a formal seizure, but did not deprive the insured of their possession or custody, or place any one in possession, and upon a bond being given a day or two afterwards, the seizure was withdrawn. The Court of Common Pleas 30 C. P. 51, held that this was a valid seizure, and that the plaintiff, who was mortgagee of the goods and to whom the loss was payable, could not therefore recover:—Held, reversing this judgment, that the plaintiff was entitled to recover. Per Burton, Patterson, and Morrison, JJ. A., that there had not been a seizure within the meaning of the condition, which refers to an actual custody and change of possession. Per Armour, J., that the condition was not binding on the insured, as it was not printed in compliance with R. S. O. c. 162, s. 4. *Wilson v. The Standard Fire Ins. Co.*, 29 C. P. 308, followed and approved of. Semble, per Patterson, J. A., that the condition was void, as being unjust and unreasonable. Remarks by Patterson, J. A., as to the principle and considerations upon which the validity of a variation of or addition to the statutory conditions should be tested and determined. *May v. The Standard Fire Ins. Co.*, 5 A. R. 605.

The plaintiff applied for an insurance upon his stock-in-trade with the defendant company.

Pending the negotiations the company's agent told the plaintiff he thought the company's condition was to allow twenty-five pounds of powder to be kept, and the plaintiff said he did not keep more than ten pounds. The insurance was then effected by an interim receipt, and on the same night the premises were burned. The plaintiff had more than ten pounds, but less than twenty-five pounds of powder in stock when the fire occurred. The statutory condition prohibited more than twenty-five pounds being kept in stock without permission, and the company's variation of their condition relieved them from liability if more than ten pounds were "deposited on the premises, unless the same be specially allowed in the body of the policy and suitable extra premium paid." The case having been dealt with on other grounds, on an appeal to the Privy Council, was remitted to this Court to try whether the variation was a just and reasonable one. The learned Judge at the trial found it to be reasonable. Held, Hagarty, C. J., dissenting, that under the circumstances of this case, inasmuch as the company's agent had represented that twenty-five pounds of gunpowder were allowed to be kept in stock, the condition now insisted upon was not a just and reasonable one to be set up by the company, or one which they could have inserted in the policy, and was therefore void, and that the plaintiff should recover. Per Armour, J.—The condition being more onerous than the statutory condition relating to the same subject matter, was for that reason to be deemed not just or reasonable. Per Hagarty, C. J., and Galt, J.—The variation was not necessarily unjust or unreasonable, Per Hagarty, C. J.—The statutory condition exempting the company from liability if more than twenty-five pounds of powder were kept without permission, does not preclude or prohibit the insurers from bargaining that they will not be liable if more than ten pounds be kept, except on certain conditions as to extra premiums, &c.; and as the plaintiff at the trial did not in his evidence mention the representation of the agent, or allege that it influenced him, and it was not relied upon there, it should not now be given effect to. *Parsons v. The Queen's Ins. Co.*, 2 O. R., Q. B. D. 45.

(c) Other Cases.

Held, that the statutory conditions were not applicable to contracts of re-insurance such as those in these cases. See *The Fire Insurance Association, Limited, et al. v. The Canada Fire and Marine Ins. Co.*, 2 O. R. 495, p. 375; *The Fire Insurance Association, Limited, v. The Canada Fire and Marine Ins. Co.*, 2 O. R. 481, p. 375.

Compliance with statutory enactment as to printing. See *Sands v. The Standard Ins. Co.*, 27 Chy, 167.

10. Notice, Account and Proof of Loss.

Upon a policy issued by a mutual company the statutory conditions were indorsed with variations, one of which was (being the same as sec. 56 of the Mutual Act, R. S. O. c. 161), that the proofs, declarations, &c., called for by the statutory conditions should be furnished to the company in writing within thirty days after the loss. The loss occurred on the 2nd October,

1878, and on the 5th, the plaintiff notified the defendants by letter. A few days after the plaintiff saw one S., an agent of the defendants for obtaining applications, though not for collecting claims, but who had acted for plaintiff in settling a previous loss with defendants, and asked him to act for him on this occasion and do what was proper, which S. promised to do. On 17th October the defendants' president came up and saw plaintiff, who informed him of the loss, and of all the circumstances relating thereto, and plaintiff was told by him in answer to his enquiry, that nothing further need be done. The plaintiff in consequence did nothing; but subsequently, on hearing that defendants disputed the claim some correspondence took place, which resulted in the plaintiff employing a solicitor, and proofs were thereupon put in, but after the lapse of thirty days:—Held, affirming the judgment of the Court of Common Pleas, 31 C. P. 562, Burton, J., dissenting, that sec. 2, of R. S. O. c. 162, relieving the insured under certain circumstances from forfeiture for non-delivery of the proofs of claim, applies to Mutual Insurance Companies, and to the time of delivery as well as to insufficiency in the proofs:—Held, Burton, J., dissenting, under the facts set out in this case, that the omission to deliver the proofs in proper time, arose from accident or mistake, within the meaning of that clause. Remarks as to the construction and effect of this clause, and the extent of the discretion given by it to the court or judge. *Robins v. Victoria Mutual Ins. Co.*, 6 A. R. 427.

11. Actions on Policies.

(a) Limitation of Time.

Held, reversing the judgment of the Court of Appeal, 4 A. R. 293, that the appellant company under the policy in this case were entitled to three months from the date of the furnishing of claim papers before being subject to an action, and that therefore respondent's action had been prematurely brought. *The Mutual Fire Insurance Co. of the County of Wellington v. Frey*, 5 S. C. R. 82.

See *McIntyre v. The National Ins. Co.*, 5 A. R. 580, p. 369.

(b) Pleading.

To a declaration on a policy of insurance made by defendants, but not averring that it was under the corporate seal, the defendants pleaded non est factum:—Held, plea good; for that the declaration set forth a complete instrument, a policy of insurance made by defendants, a corporation, which ex vi termini, imported a seal; and in any event the plaintiff could not be embarrassed by the plea, as it must, under the Judicature Act, Rules 141 and 493, be treated as a mere denial of the making of the contract of insurance in fact, and not of its legality or sufficiency in law. *Burnett v. The Union Mutual Fire Insurance Co.*, 32 C. P. 134.

Where a right of suit exists in a body of persons too numerous to be all made parties, the court will permit one or more of them to sue on behalf of all, subject to the restriction that the relief prayed is one in which the parties whom the plaintiff professes to represent have all of

them an interest identical with that of the plaintiff. But where a mutual insurance company had established three distinct branches, in one of which, the water-works branch, the plaintiff insured, giving his promissory note or undertaking to pay \$168, and the company made an assessment on all notes and threatened suit in the Division Court for payment of such assessment, whereupon the plaintiff filed a bill "on behalf of himself and the other policy holders associated with him as hereinafter mentioned," alleging the company was about to sue him and the other policy holders in said branch, that large losses had occurred in the company prior to the time of his effecting his insurance, and insisting that he and the other policy holders could be properly assessed only in respect of such losses as had arisen since they entered the company, and praying that the necessary inquiries might be made and accounts taken, alleging that the Division Courts had not the machinery necessary for that purpose:—Held, that according to the statements of the bill, the policy-holders in the water-works branch were not represented in the suit, and a demurrer on that ground filed by the company was allowed with costs. *Thomson v. The Mutual Fire Ins. Co. et al.*, 29 Chy. 56.

(c) Reference to Arbitration.

The condition by which the defendants sought to defeat the action provided that all disputes touching loss or damage, should, after proof thereof, be submitted to arbitrators to determine the amount, but not the liability, and that an action against the company should not be sustainable until after an award had been obtained fixing the amount, or unless such action should be commenced within twelve months after the loss; and the defendants covenanted, in the body of the policy, to pay the loss within sixty days after the loss should be ascertained and proved in accordance with the terms of the policy. It appeared that the assured had furnished the defendants with proof of the loss on the 5th of April, to which the defendants made no objection until the 11th of June following, when they served a written request for an arbitration upon the assured, who refused to arbitrate, and the plaintiff, to whom the claim was assigned, brought this action:—Held, that even if the condition were available as a defence, it had not been broken, as in the absence of a request to arbitrate within the sixty days, the loss must be considered as "ascertained and proved," and the plaintiff therefore, had a right of action on the expiration of that period. *McIntyre v. The National Ins. Co.*, 5 A. R. 580.

The defendants required the plaintiffs to proceed to arbitration to ascertain the amount of loss under a policy issued by the defendants in favour of the plaintiff, which contained the statutory condition as to reference to arbitration. The plaintiff was willing to arbitrate as to amount provided the defendants would admit liability for the loss. This the defendants refused to do:—Held, affirming the order of Armour, J., reversing the order of the Master in Chambers, that the defendants were not entitled to a stay of proceedings until the amount had been ascertained by arbitration. *Hughes v. London Assurance Co.*, 4 O. R., Q. B. D. 293.

12. Insurance by or for Mortgagee—Right of Subrogation.

M. who had mortgaged his property to the plaintiffs, subsequently on the second of April, 1881, insured with defendants, loss if any payable to plaintiffs. Attached to the policy on a printed slip dated 29th May, 1881, was the following clause: "It is hereby agreed that this insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy;" a loss having occurred the defendants disputed their liability, and the matter was referred to an arbitrator, who awarded in favour of the plaintiffs, after refusing to admit evidence for the defendants, that the policy had been obtained by fraud:—Held, that the above clause provided only against future acts that the defendants did not thereby guarantee the policy to the plaintiffs as indisputable, and therefore that they were not debarred from setting up that the insurance had been effected by fraud, and the case was remitted to the arbitrator for the admission of such evidence:—Held, also, that the clause did not amount to a new insurance in favour of the mortgagee. *Omnium Securities Co. v. Canada Fire Mutual Ins. Co.*, 1 O. R., Q. B. D. 494.

On Feb. 21st 1879, A. B. & Co., the plaintiffs, gave a mortgage on a mill property covenanting to insure, which they did in the R. company, by policy dated 19th March, 1879, expiring 1st March, 1880. On 10th March, 1879, A. left the firm. On 1st March, 1880, the mortgagees, having received no renewal receipt of the above policy, insured the property in the U. company in the name of the plaintiffs. This U. policy provided that the loss should be payable to the mortgagees, and the insurance as to the interest of the latter should not be invalidated by any act of the mortgagors, and that if the mortgagors did any act invalidating the policy, and the insurers should pay the amount of the policy to the mortgagees, they should be subrogated to the rights of the latter, or might pay the whole of the mortgage debt, and obtain an assignment of the mortgage. There was no written application for the U. policy. The R. policy was simply handed to the insurers, and from it they drew their policy, which had the statutory conditions only. No representations were made to them in any other way. The premium was paid by the mortgagees, who collected it from the plaintiffs, the latter having taken no part in effecting it. On 14th March, 1881, the mortgagees wrote a letter to the plaintiffs in which they represented the U. policy as indisputable. A fire having occurred the U. company paid the mortgagees the amount of the loss, which more than covered the amount due on the mortgage, of which they took an assignment. The evidence shewed that at the time of effecting this policy there were certain insurances on the property, and also certain mortgages, of which the U. company were not informed and to which they never assented. The plaintiffs now, suing on the U. policy claimed to have the mortgage discharged and the balance of the insurance money paid to them, and the U. company counterclaimed for the amount due on the mortgage:—Held, (reversing the decision of Ferguson, J.), that the non-communication of A.'s re-

tirement from the firm was not a breach of statutory condition No. 1, because A, though he had retired, retained an insurable interest, both as liable on the covenants in the mortgage, and as still retaining the right to redeem the mortgage; and, moreover, even if A. had no interest at all, the surviving partners could recover according to the extent of their interest. Semble, even if notice of the change had been of moment, yet, since the evidence shewed that the matter of the policy, as between the mortgagees and the U. company, was left to the under-clerks to deal with, and that a clerk of the mortgagees informed a clerk of the U. company of the change in question, a jury might properly find that notice of the change was communicated to the U. company. *Klein et al. v. The Union Fire Ins. Co. et al.*, 3 O. R., Chy. D. 234.

Held, further, that the non-communication of other mortgages, subsequent to that to the plaintiffs, was not a breach of statutory condition No. 1, because such non-communication will not, apart from stipulation, irrespective of the nature and amount of the other mortgages, and without any imputation of fraud, avoid a policy; and also because the plaintiffs were not bound unasked to state the exact nature and extent of the interest to be insured, and there was at least contributory negligence on the part of the insurers, who might be regarded as having waived information as to the mortgages. *Samo v. Gore District Mutual Ins. Co.*, 1 A. R. 545, followed. *Ib.*

Held, further, that the fact of there being two prior insurances unassented to was not a breach of statutory condition No. 8, because the evidence shewed the U. policy was to take the place of the R. policy, and of the prior insurances one was assented to on the face of the R. policy and the other had been taken in substitution for another, which also appeared as assented to on the R. policy. It was the duty of the U. company to have properly issued their policy, agreeing to take the position of the R. company, as also it was the duty of the mortgagees to see the policy properly issued. *Ib.*

Held, further, that the letter of March 14th, 1881, contained representations which the mortgagees were bound to make good, especially as the U. company acted as agents for the plaintiffs in effecting the policy. *Ib.*

Held, further, that the claim of the U. company to foreclose could not be entertained, for the U. company could not take advantage of their own default, in not making the formal entry of assent to the prior insurances on their policy, to bring into play the subrogation clause for their own advantage. *Springfield Fire Ins. Co. v. Allen*, 43 N. Y. 387, distinguished. *Ib.*

Held, lastly, on the whole case, it should be declared that the mortgage had been paid, and the proper discharge should be executed, and the mortgagees should pay the balance of the insurance money to the plaintiffs, with interest, with costs of suit to the plaintiffs as against both defendants, but without prejudice to the defendants litigating their respective liabilities as between themselves. *Ib.*

Quære, also, whether upon the facts stated in the report the plaintiffs were not entitled to recover on the ground of a compromise made between the parties. *Ib.*

See *Greet v. Citizens Ins. Co.*; *Greet v. Royal Ins. Co.*, 5 A. R. 596, p. 358; *Howes v. The Dominion Fire and Marine Ins. Co.*, 8 A. R. 644, p. 361.

13. Mutual Insurance Companies.

(a). Premium Notes and Assessments.

The directors of the plaintiffs' company, a mutual insurance company, incorporated under C. S. U. C. c. 52, assessed the defendant on his premium note or undertaking in the sum of \$42, to pay two promissory notes given for money borrowed by the company purporting to be under "Act of Parliament and by-law No. 7." These two notes were made several years before the issuing of the defendant's policy, and were kept renewed up to the time of the assessment:—Held, that the assessment was invalid, for that under the by-law and statutes in force at its passing, which are set out in the case, a renewal of the said notes was not authorized; and it could not be upheld under R. S. O. c. 161, s. 29, in force when the notes were made, for though that Act authorized the issue of notes for all lawful purposes of the company, and the indefinite renewal thereof, by the by-law the money raised by the notes could be applied only to pay losses then incurred, or due, or accruing within the year during which the notes were current, and assessable under the R. S. O. c. 161, only on the premium undertakings existing at the time such losses were incurred. Quære, whether premium notes of the company could be assessed for the payment of these notes. *The Victoria Mutual Fire Ins. Co. v. Thompson*, 32 C. P. 476.

Where a sum charged for re-insurance of the policies of one branch in another branch of the company, and therefore illegal and ultra vires, was included in an assessment for losses otherwise good:—Held, that this did not invalidate the assessment. *Ib.*

Quære, whether the note given for the premium in this case was negotiable notwithstanding the special agreement in it, and as to the effect of the defendants being described therein as the "Watertown Insurance Company," while their real name was "The Agricultural Insurance Company of Watertown, N. Y." *Sears v. The Agricultural Ins. Co. et al.*, 32 C. P. 585.

The defendants, a mutual insurance company, in existence at the time of the passing of the Mutual Companies' Act of 1873, 36 Vict. c. 44, O., had divided their business into several branches, and had also raised a guarantee capital fund, out of which the losses in all the branches as they arose were paid. The by-law for raising the guarantee fund, passed on the 12th January, 1874, contained a provision that from the surplus profits of the company from year to year, and by assessment on premium notes, a reserve fund should be created for the purpose of paying off the guarantee capital. In a suit by a creditor to realize the assets of the company, it appeared that the amounts to be collected on the premium notes in two branches, would not suffice to pay the losses in those branches, and that the amounts to be collected on such notes in the other two branches were sufficient for that purpose:—Held, by Proudfoot, J. V. C., on appeal from the Master, (27 Chy. 391), that the policy-holders in the solvent branches were liable to be assessed on their

premium notes for the purpose of paying off the liability due to the guarantee stockholders so far as might be necessary to discharge losses paid in those particular branches from the guarantee fund:—Held, on appeal to this court, that whatever might be the power of the directors, the Court of Chancery had no jurisdiction to make the assessment. *Duff v. Canadian Mutual Ins. Co.*, 6 A. R. 238.

Quære, per Burton, J. A., as to the effect of sec. 75 of R. S. O. c. 161, and its inconsistency with the clauses of the Act relative to branches and the exemption of the members of one branch from liability for claims on another. *Ib.*

Where an application was made to the court to add the persons who had signed premium notes as parties in the Master's office, and to direct the Master to assess the amounts due upon the notes, and to order payment of the same to the receiver from time to time, it was shewn that the directors had not made any assessments upon the notes pursuant to R. S. O. c. 161, s. 45 et seq:—Held, that as the liability attached only upon such assessment by the directors, the court should not add to, or alter the liability of the parties who had made the notes by referring it to the Master or a receiver to do that which the directors only could do, clause 75 of 36 Vict. c. 44, which gave power to a receiver to do this, having been omitted from the statute on revision. *Hill v. Merchants' and Manufacturers' Ins. Co.*, 28 Chy. 560.

(b) Other Cases.

Held, that the directors of a mutual insurance company may, under R. S. O. c. 161, s. 29, borrow money on promissory notes or debentures without passing a by-law under seal. *The Victoria Mutual Fire Ins. Co. v. Thompson*, 32 C. P. 476.

Held, that the defendants as a mutual insurance Company, were capable of granting insurances in Quebec as well as in Ontario. *Duff v. The Canadian Mutual Fire Ins. Co.*, 27 Chy. 391.

Trustees being indebted to the plaintiffs and holding stock in the defendant's company assigned the stock to the latter in consideration of a sum expressed to be paid by them for the trustees to the plaintiffs. The sum was paid by the issue of the defendant's debenture to the plaintiffs:—Held, that the transaction did not constitute a "loan of money" from the plaintiffs to the defendants within the meaning of 31 Vict. c. 52, s. 12, (O.), and that the issue of the debenture was therefore ultra vires. *Bank of Toronto v. Beaver and Toronto Mutual Ins. Co.*, 28 Chy. 87.

A solicitor's claim for costs, after a retainer by a Mutual Fire Insurance Company, was held to be a debt for which the company was liable, not each branch of the company for its own proportion. *Duff v. Canadian Mutual Fire Insurance Co.*, 9 P. R. 292.—Proudfoot. But see *S. C. 2 O. R. 560*, p. 374.

The claim being one to B. & D., B. assigned his interest in it to D., upon certain trusts in which, however, B. had no interest:—Held, that the assignment was absolute, and B. entitled to sue:—Held, that B. having been president of the company when the costs were incurred was no objection. *Ib.*

Held, Osler, J., dissenting, that under the Mutual Insurance Act, R. S. O. c. 161, the costs of a solicitor for services rendered to a Mutual Insurance Company, are chargeable not against the general assets of the company, but against the respective branches for which the services were in fact rendered, and in case of deficiency of assets of any of the branches the other branches are not liable for the claims thereon. *S. C.*, 2 O. R., C. P. D. 560.

Per Osler, J.—A creditor of the company, for a debt incurred as part of the necessary expenses thereof, though in relation to the business of some branches only, is entitled to be paid out of moneys derived from assessments for losses and expenses on policy holders in other branches. *Ib.*

The defendants were authorized by their charter to carry on both proprietary and mutual insurance business; but they were debarred from taking risks which were extra-hazardous in the mutual branch. The plaintiffs' property falling within the prohibited class, was insured with the defendants by a policy which was not on its face a mutual one, but an absolute undertaking to pay the loss, but instead of making a cash payment they gave a premium note upon which they paid several assessments. The application also was headed "Premium Note System:—Held, reversing the judgment of the Court of Chancery, 28 Chy. 525, that the policy was not a mutual one, there being nothing except the premium note, which was not conclusive, to indicate that it was a mutual insurance, and the property being of such a nature that it could not be insured in the mutual branch. Quære, per Cameron, J., whether the risk was sufficiently shewn to be one which defendants could not insure in their mutual branch. *Lowson et al v. Canada Farmers' Mutual Fire Ins. Co.*, 6 A. R. 512.

Held, also, following *Parsons v. Standard Ins. Co.*, 5 S. C. R. 233, that a change in the company in which another insurance has been effected, not increasing the amount insured, did not avoid the policy. *Ib.*

Held (reversing the decision reported 9 P. R. 185, which followed *Lount v. The Canada Farmers' Ins. Co.*, 8 P. R. 433, that R. S. O. c. 161, s. 61, providing, as to mutual insurance companies, that no execution shall issue against such company upon any judgment until after the expiration of three months from the recovery thereof, does not apply where the judgment has been recovered on a policy issued by the company on the cash principle. *S. C.*, 8 A. R. 613.

See *Robins v. Victoria Mutual Fire Ins. Co.* 31 C. P. 562, 6 A. R. 427, p. 368; *Ballagh v. The Royal Mutual Ins. Co.* 5 A. R. 87, p. 365; *The Mutual Fire Ins. Co. of the County of Wellington v. Frey*, 5 S. C. R. 82, p. 364.

14. Re-insurance.

The Dominion Insurance Co. insured one H. against loss by fire to the amount of \$5,000, and under a contract of re-insurance made between the defendants and the Dominion Company, the latter company re-insured \$2,500 with the defendants. Subsequently the Dominion Company entered into an agreement with the Fire Association, whereby, after reciting that

the Dominion Company desired to be relieved from and guaranteed against loss on existing risks, and that the Fire Association had agreed to do so and to re-insure said risks, the company transferred all their business and the good will thereof to the association, who thereby re-insured all the existing risks, subject to the terms of the policies, &c.; the association to take and accept all re-insurances made with other companies, with power to use the company's name. A loss occurred on H.'s policy which was adjusted and paid by the association. In an action against the defendants to recover the amount of the re-insurance:—Held, that the defendants could not escape liability for either one or the other of the plaintiffs was entitled to recover; and that there was nothing in an objection raised as to double indemnity. *The Fire Ins. Association (Limited) et al. v. The Canada Fire and Marine Ins. Co.*, 2 O. R., Q. B. D. 481.

Held, also, that the statutory conditions could not be imported into and read with either the agreement between the plaintiffs, or that between the Dominion Company and the defendants. *Id.*

Held, that the defendants' contract of re-insurance did not prevent the plaintiffs from assenting to any reasonable and proper waiver of conditions made in good faith, and not shewn to influence the loss or increase the burden of the re-insurers; and therefore an assent given by the Dominion Company to a chattel mortgage on some of the insured goods, without the defendants' knowledge and assent, did not release the defendants. *Id.*

Under a state of facts similar to those stated in the preceding case, except that the insurance was of one C.'s property:—Held, that the plaintiffs were entitled to recover, for treating the agreement between the plaintiffs as a re-insurance, (though more properly a transfer of business with its liabilities and collateral securities), if it was of the whole amount of the Dominion Company's liability, the association having paid the whole loss to the company, or which was the same thing, to C., were entitled irrespective of any assignment to contribution from defendants: if, however, it was only of the residue of C.'s risk the defendants were still liable to the company on their policy, and by the very terms of the agreement it was effectually assigned to the association, who acquired all their co-plaintiff's rights and interest in it:—Held, also, that the statutory conditions were not applicable to such a contract of re-insurance as in this case. *The Fire Insurance Association (Limited) et al. v. The Canada Fire and Marine Ins. Co.*, 2 O. R., C. P. D. 495.

II. LIFE ASSURANCE.

1. Insurable Interest.

G. applied to respondents' agent at Quebec for an insurance on his life, and having undergone medical examination, and signed and procured the usual papers, which were forwarded to the head office at New York, a policy was returned to the agent at Quebec for delivery. G. was unable to pay the premium for some time, but L., at the request of the agent at Quebec, who had been entrusted with a blank, executed an assignment of the policy, paid the premium and took the

assignment to himself. Subsequently, L. assigned the policy, and the premiums were thenceforth paid by the assignee. Prior to G.'s death, the general agent of the company enquired into the circumstances and authorized the agent at Quebec to continue to receive the premiums from the assignee:—Held (Gwynne, J., dissenting), That at the time the policy was executed for G., he intended to effect a bona fide insurance for his own benefit, and as the contract was valid in its inception, the payment of the premium when made related back to the date of the policy, and the mere circumstance that the assignee, who did not collude with G. for the issue of the policy, had paid the premium and obtained an assignment, did not make it a wagering policy. *Vezina v. The New York Life Ins. Co.*, 6 S. C. R. 30.

2. Overdue Premiums.

By a policy of insurance, dated 13th April 1869, for the payment of the annual premium of \$29.56, payable quarterly, the defendants jointly assured the lives of the plaintiff and his wife in \$1,000, and engaged to pay the same on the death of the assured when the event provided for happened, deducting therefrom all notes for premiums on the policy unpaid at that time, together with any balance of the year's premium remaining unpaid. And in case the assured should not pay the said premiums on or before the said several days, &c., and the interest on all notes on account of premiums until the same were paid, the company should not be liable for any sum, "with the exception that in case this policy is allowed to lapse, after one full annual payment has been made, the insurance will be continued in force for the period which the equitable value of the policy at the time of lapse would purchase." Payments of premiums were made in cash from 13th April, 1869, to, but not including 13th January, 1874, upon which day the policy lapsed, being for four years and three-fourths of a year, which, by the company's tables under the equitable non-forfeiting system, extended the policy after the lapse for a period beyond the 2nd January, 1877, when the plaintiff's wife died. It appeared that on the 28th January, 1875, the plaintiff gave defendant's agent a so-called promissory note for the four instalments due in 1874, being up to, but not including, 13th January, 1875, which note was payable in three months, and provided that if not paid at maturity with interest at seven per cent., the policy should be null and void. It also appeared that on the 8th April, 1875, during the currency of the note, the plaintiff paid, and the company received payment in cash of the premium which fell due on the 13th January, 1875. In an action by the plaintiff to recover the amount of the policy:—Held, that he was entitled to recover: that by the cash payments made up to the 13th January, 1874, there was a right to the benefits of the policy for such extended period: that it could not be deemed to be the intention of the parties to abridge such rights by the note of the 28th January, 1875, but that the effect of non-payment thereof was merely to put the parties in the same position as if the note had not been given. Per Galt, J.—To work a forfeiture for the non-payment of a promissory note, as the one in this case, the company must demand payment of it on the day it becomes due, and, if not paid, de-

clare the policy forfeited or void. *Semble*, per *Wilson, C. J.*, the company, by receiving the premium in cash for a period subsequent to that for which the forfeiture was claimed, had waived such forfeiture, though the receipt was before the forfeiture had accrued. *Watts v. Atlantic Mutual Life Ins. Co.*, 31 C. P. 53.

J. M. was insured by a life policy, under which thirty days' grace was allowed for payment of premiums, and a lapsed policy might be renewed within a year upon proof of health, payment of arrears, and a fine. *S.* was the resident secretary in Canada of the defendants, with the powers of a general manager, and there was a local board of directors in Canada, but *S.* managed all matters connected with the receipt of premiums, communicated directly with the board in England, took his instructions from them, and laid before them monthly accounts from which it could be ascertained whether premiums falling due the preceding month were unpaid. The assured, being unable to pay a premium about to fall due, wrote to *S.* asking him to take a note at three months. *S.* replied, "I am sorry you require three months' time, but I suppose it must be done, although it is against our rules. I shall have to take the responsibility myself. I enclose you draft for acceptance, which please return early." He also wrote that the company were very particular about overdue premiums. From this time *S.* accommodated the assured by taking notes, to which interest was added. On the 9th of August, 1879, *E.*, the cashier of defendants, wrote to the assured, acknowledging the receipt of his letter with a blank note which had been sent to *S.* to be filled up for the renewal of a note about to fall due, and saying that *S.* was absent from town, and that as the two premiums of November, 1878, and May, 1879, were so long overdue he should have to refer the matter to *S.* on his return, adding, "until these back premiums are paid the society is off the risk." The death occurred on the 29th October, 1879, at which time there were two notes outstanding—one for the premium due 30th November, 1878, dated 7th February, and due 10th August, 1879, which was unpaid, and one dated 21st June, 1879, at six months, for the premium which fell due on the 30th May, 1879, which was still current. After the death the amount of these two notes was tendered to the defendants and refused. *S.* being examined, said he did his best to keep the policies alive, and had no doubt at the time of his authority to do so. The jury found that the notes were taken by the defendants' agent as cash payments; that the taking of them was within his authority; and that he had waived payment upon the dates the premiums were due; and a verdict was entered for plaintiff:—Held, (*Hagarty, C. J.*, dissenting) that the evidence shewed that it was within the authority of the resident secretary to accept notes in payment of premiums, and there was nothing shewing notice to the assured of any want of such authority; that the non-payment of the note in August, 1879, while the other note was current, did not determine the policy; and the verdict ought not to be disturbed. Per *Armour, J.*—The defendants in England had become aware by the returns sent by *S.*, of the forbearance granted by him, and had ratified it. Per *Hagarty, C. J.*—Admitting that *S.* might accept payment after the proper time, he could not make a binding executory

agreement to give further time, extending perhaps beyond the duration of the life. *Moffatt v. The Reliance Mutual Life Assurance Society*, 45 Q. B. 561.—This case has been carried to appeal.

By a policy of insurance upon the life of *J. N.* it was stipulated that if any premium should not be paid when due, the consideration of the contract should be deemed to have failed, and the company released from liability. By another clause, if an overdue premium was received, it was to be upon the express condition that the assured was in good health, &c., and if the fact were otherwise, the policy should not be put in force by such receipt. A cheque was given for a quarterly premium, with the request to hold it for a few days, as there were not then funds, which was received by the agent but the premium receipt was not given up. It was afterwards presented but not accepted. On the 21st October funds were provided, but it being then after banking hours, the cheque was not presented. That night *J. N.* was killed:—Held, affirming the decision of the court below (45 Q. B. 593) that the policy lapsed the day after the premium fell due; that nothing but payment could then revive the policy, and that there was not any evidence of payment, or of anything dispensing with it. *Neill v. Union Mutual Life Ins. Co.*, 7 A. R. 171.

3. Rectifying Mistake in Policy.

Action to recover the amount of a policy of insurance issued by the appellants for the sum of \$2,000, payable at the death of the respondent, or at the expiration of eight years, if he should live till that time. The premium mentioned in the policy was the sum of \$163.44, to be paid annually, partly in cash and partly by the respondent's notes. The appellants by their plea alleged that the insurance had been effected for \$1,000 only, and that the policy had by mistake been issued for \$2,000; that as soon as the mistake had been discovered they had offered a policy for \$1,000, and that previous to the institution of the action they had tendered to the respondent the sum of \$832.97, being the amount due, which sum, with \$25.15 for costs (which had not been tendered), they brought into court. Since October, 1869, when a new policy was offered, the premiums were paid by the respondent and accepted by the appellants, under an agreement that their rights would not thereby be prejudiced, and that they would abide by the decision of the courts of justice to be obtained after the insurance should have become due and payable. Parol evidence was given to shew how the mistake occurred, and it was established that the premium paid was in accordance with the company's rates for a \$1,000 policy:—Held, that the insurance effected was for \$1,000 only, and that the policy had by mistake been issued for \$2,000. *The Etina Life Insurance Company v. Brodie*, 5 S. C. R. 1.

4. Other Cases.

Action on a life policy. The application contained a number of questions and answers, and at the foot was a declaration, signed by the assured, that to the best of his knowledge and belief the foregoing statements and other particu-

lars were true; that the declaration should form the basis of the contract; and that if any untrue averment had been intentionally made therein or in the replies to the company's medical adviser in connection therewith, the policy should be void. By the policy the declaration and "relative papers" were made the basis of the contract, with a proviso that if any fraudulent or wilfully untrue material allegation was contained in said declaration; or if it should thereafter appear that any material information had been withheld, and any of the matters set forth had not been truly and fairly stated, then the policy should be void. To the questions in the application as to the name and residence of usual medical attendant, and for what serious illness had he attended, the assured answered "none"; and to the questions by the medical adviser as to what other disease or personal injury and from whom had he received professional assistance, &c., the assured answered "none." It was found that these answers were wilfully untrue, and that the information was wilfully withheld from and was material to be stated to the company:—Held, that these answers constituted a breach of the express contract between the parties, and therefore the policy was void. *Russell v. The Canada Life Assurance Co.*, 32 C. P. 256.

The pleas setting up the above defences were added at the trial, and after the case had been in progress for some time. The action was commenced before the Judicature Act came in force, but the trial took place thereafter:—Held, that, whether under sec. 8 of the Administration of Justice Act, or under Rule 128 of the Judicature Act, the pleas were properly added. A replication to these pleas set up that certain correspondence between the company's general manager and their local agent, but of which the assured had no notice, directing the agent to make enquiries as to the habits, &c., of the assured, upon the result of which the agent was to issue the policy, constituted an agreement that the company would rely on the judgment of the agent alone founded on such enquiries:—Held, that the replication could not be supported, either at law or on the facts. *Id.*

Per Wilson, C. J.—Where the materiality of certain enquiries is obvious, and is assumed at the trial—as e. g. with regard to the temperate habits or otherwise of the deceased—there is no need to submit it to the jury. *Id.*

The manager of the defendant company entertaining doubts as to the propriety of accepting A. R.'s application for a risk on his life, caused the local agent of the company to make further enquiries as to A. R.'s habits, &c. On receiving a satisfactory report from the agent a policy was issued:—Held, that the defendants were not thereby precluded from relying upon the written application of A. R. and shewing that it contained wilfully untrue statements, the effect of which was by the express stipulations thereof sufficient to avoid the policy. The judgment of the court below, 32 C. P. 256, *supra*, in other respects affirmed. *S. C.*, 8 A. R. 716.

The defendant's Act of Incorporation provided that "all policies shall * * be signed * * and being so signed and countersigned and under the seal of the company, shall be deemed valid and binding upon them." The policy sued on

was issued by the company without the corporate seal being affixed, although the attestation clause stated that the company had thereunto affixed its seal:—Held, affirming the judgment of the C. P. (29 C. P. 221), that the policy was a valid contract to grant an insurance. Per Moss, C. J. A. The policy supplied internal evidence of a mutual mistake against which a Court of Equity would, if necessary, relieve. *Wright v. The Sun Mutual Life Ins. Co.*, 5 A. R. 218.

Sec. 7 of the statute, incorporating the appellants (37 Vict. c. 85 Ont.), after specifying the powers of the directors, enacts as follows: "but no contract shall be valid unless made under the seal of the company, and signed by the president, vice-president, or one of the directors, and countersigned by the manager, except the interim receipt of the company, which shall be binding upon the company on such conditions as may thereon be printed by direction of the board." J. E. W. brought an action to recover the amount of a policy issued by the appellants in favour of her father. The policy sued on was on a printed form, and had the attestation: "In witness whereof, the London Life Insurance Co. of London, Ontario, have caused these presents to be signed by its president, and attested by its secretary, and delivered at the head office in the city of London, &c." To a plea that the policy sued on was not sealed, and therefore not binding upon the appellants. The plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all parties as a valid policy, but the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal or ordered to affix it:—Held, affirming the judgment of the Court of Appeal, 5 A. R. 218, and the Court of Common Pleas, 29 C. P. 221, that the setting up of "the want of a seal" as a defence was a fraud which a court of equity could not refuse to interfere to prevent without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears, and therefore the respondent was entitled to the relief prayed, as founded upon the facts alleged in her equitable replication (Ritchie, C. J., and Taschereau, J., dissenting). *The London Life Ins. Co. v. Wright*, 5 S. C. R. 466.

Friendly society—Regulations respecting insurance—Forfeiture. See *Oates v. The Supreme Court of the Independent Order of Foresters*, 4 O. R. 535, p. 309.

III. ACCIDENT ASSURANCE.

By certain conditions of a policy of insurance against accident, it was provided that the insurance should not extend to any bodily injury where the death or injury might have happened in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure, or of violating the rules of any company or corporation &c., or while engaged in, or in consequence of any unlawful act: that the insured should use all due diligence for personal safety and protection, &c.; and that standing or walking on a railroad track, were hazards not contemplated or covered by the contract. Where

the insured was killed by being run over by an engine while contrary to the rules of the Northern Railway Company, and the statute 42 Vict. c. 9, s. 16, sub-ss. 5, 6, D., driving a horse and buggy on the private grounds of the said railway company at a place where there was a network of tracks, and where it was most dangerous to be:—Held, that there could be no recovery, and a nonsuit was entered. *Neill v. Travellers' Ins. Co.*, 31 C. P. 394.

On appeal the decision of the Court of Common Pleas, supra, the court being equally divided, was dismissed, with costs. Per Hagarty, C. J., and Cameron, J. The evidence shewed that the deceased had voluntarily gone unnecessarily into a place of danger. Per Burton and Patterson, J.J.A. In an action upon an accident policy the plaintiff having proved a claim *prima facie* within the policy, it was for the defendants to shew that the deceased voluntarily exposed himself to unnecessary danger or one of the other defences set up. The nonsuit therefore was improper and a new trial should have been granted. One of the conditions of the policy was that the insured should not stand or walk on a railway track. Per Cameron, J., and *semble* per Hagarty, C. J. Such condition was broken by the insured driving on, not simply crossing, a railway track in a buggy. Per Burton, J. A. Such condition was intended to apply to the case, common in Canada, of persons using the railway tracks as roadways, and could not be considered as applying in every case of an accident to the insured while on such track. *S. C.*, 7 A. R. 570. Affirmed in the Supreme Court 23rd June, 1884.

IV. MARINE INSURANCE.

1. Insurable Interest.

C. made advances to B. upon a vessel, then in course of construction, upon the faith of a verbal agreement with B., that after the vessel should be launched, she should be placed in his hands for sale, and that out of the proceeds the advances so made should be paid. When the vessel was well advanced C. disclosed the facts and nature of his interest to the agent of the respondent's company, and the company issued a policy of insurance, against loss by fire, to C. in the sum of \$3,000. The vessel was still unfinished, and in B.'s possession when she was burned:—Held, reversing the judgment of the court below, that C.'s interest, relating as it did to a specific chattel, was an equitable interest which was insurable, and therefore C. was entitled to recover. *Clark v. The Scottish Imperial Ins. Co.*, 4 S. C. R. 192.

2. Conditions.

The appellants issued a marine policy of insurance at Toronto, dated the 28th November, 1875, insuring, in favour of the respondent, \$3,000 upon a cargo of wood goods laden on board of the *barque Emigrant*, on a voyage from Quebec to Greenock. The policy contained the following clause:—"J. C., as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in

all, doth make insurance and cause three thousand dollars to be insured, lost or not lost, at and from Quebec to Greenock, vessel to go out in tow." The vessel was towed from her loading berth in the harbour into the middle of the stream near Indian Cove, which forms part of the harbour of Quebec, and was abandoned with cargo by reason of the ice four days after leaving the harbour and before reaching the Traverse. On an action upon the policy it was:—Held (Fournier and Henry, J.J., dissenting), that the words "from Quebec to Greenock, vessel to go out in tow," meant that she was to go out in tow from the limits of the harbour of Quebec on said voyage, and the towing from the loading berth to another part of the harbour was not a compliance with the warranty. Per Ritchie, C. J. The question in this case was not, if the vessel had gone out in tow, how far she should have been towed in order to comply with the warranty, the determination of this latter question being dependent on several considerations, such as the lateness of the season, the direction and force of the wind, and the state of the weather, and possibly the usage and custom of the port of Quebec, if any existed in relation thereto. Per Gwynne, J. The evidence established the existence of a usage to tow down the river as far as might be deemed necessary, having regard to the state of the wind and weather, sometimes beyond the Traverse, but ordinarily at the date of the departure of the plaintiff's vessel, at least as far as the Traverse. *The Provincial Insurance Co. of Canada v. Connolly*, 5 S. C. R. 258.

3. Seaworthiness.

It appeared that the vessel was driven ashore on the 6th September, and that the plaintiffs got her off and towed her to Detroit, where she was put into dry dock and repaired. The salvage charges amounted to \$4,000. On 26th September, the owner gave notice of abandonment, and claimed as for a total loss, and the plaintiffs settled with him for \$3,000. On 29th September the vessel was libelled for seamen's wages and salvage charges, and was subsequently sold to pay same. The actual damage done to the vessel only amounted to \$175. At the time of the accident the vessel had only one anchor, having a short time previously lost a second one she had. There was no express warranty of seaworthiness:—Held, that the policy being a time policy there was no implied warranty of seaworthiness. *The Phoenix Insurance Co. v. The Anchor Insurance Co.*, 4 O. R., C. P. D. 524.

4. Abandonment and Loss.

T., respondent, was the owner of a vessel called the "*Susan*," insured for \$500 under a valued time policy of marine insurance, underwritten by G., the appellant, and others. The vessel was stranded and sold, and T. brought an action against G. to recover as for a total loss. From the evidence, it appeared that the vessel stranded on the 6th July, 1876, near Port George, in the County of Antigonish, adjoining the County of Guysboro', N.S., where the owner resided. The master employed surveyors, and on their recommendation, confirmed by the judgment of the master, the vessel was advertised for

sale on the following day, and sold on the 11th July for \$105. The captain did not give any notice of abandonment and did not endeavour to get off the vessel. The purchasers immediately got the vessel off, &c., had her made tight, and taken to Pictou, and repaired, and they afterwards used her in trading and carrying passengers:—Held, on appeal, that the sale by the master was not justifiable, and that the evidence failed to shew any excuse for the master not communicating with his owner so as to require him to give notice of abandonment, if he intended to rely upon the loss as total. Per Gwynne, J., that it is a point fairly open to enquiry in a court of appeal, whether or not, as in the present case, the inferences drawn from the evidence by the judge who tried the case without a jury, were the reasonable and proper inferences to be drawn from the facts. *Gallagher v. Taylor*, 5 S.C.R. 368.

See *The Phoenix Ins. Co. v. The Anchor Ins. Co.*, 4 O. R. 524, p. 334.

5. Re-insurance.

One B., who was the agent at Montreal, of the plaintiff and defendant Companies, accepted a risk on a vessel of \$7,700 for the defendants, but as the limit prescribed by them on any one vessel was \$5,000 he had to re-insure for \$2,700 and he immediately directed his clerk to write a memorandum of application and acceptance in the books of the plaintiffs for a re-insurance of \$2,700 which was done; but the clerk whose duty it was to endorse the particulars on the open policy issued by the plaintiffs, prepare the certificate, and report the transaction in the daily return, unintentionally omitted to do so, and no notice of the re-insurance was given to the plaintiffs, until after the loss occurred. After they had paid the loss, the plaintiffs discovered the irregularity, and filed a bill to recover the money as paid under a mistake of fact:—Held, affirming the decree of Blake, V.C., 26 Ch. 264, that the plaintiffs were not entitled to recover, as the application and acceptance of the risk were, under the circumstances, sufficient to constitute a binding contract of re-insurance. *The Canada Fire and Marine Ins. Co. v. The Western Assurance Co.*, 5 A. R. 244.

On 1st September, 1881, the plaintiffs insured the vessel *Mary Merritt* for \$6000 for fifteen days, by acceptance of an application made to them by M. the owner. On the same day a memorandum was written in the margin of the application and signed by the manager and secretary of the defendant company, that they covered one fourth, subject to survey and approval at first port of arrival, &c. It was understood that there was an allowance of 8 per cent. for particular average. On 4th April, 1881, an agreement had been entered into between the companies under which defendants were to cover a fourth part of all vessel risks accepted by plaintiffs: but it was expressly agreed that the risks covered were only on hulls of vessels not classed below B. 1. By defendants Act of Incorporation, 35 Vict. c. 103, D., all policies, instruments, &c., issued or entered into by defendants, were to be signed by the president or vice-president, and countersigned by the manager and secretary, or as otherwise directed by the rules and regulations of the

company in case of their absence, and so signed they should be deemed valid, &c.:—Held, that the plaintiffs could not rely on the agreement of the fourth April, as it was limited to vessels not below B. 1. and the vessel insured had not been classed; but that the contract was contained in the memorandum written in the margin of the application, and that it was so signed as to be binding on the defendants, for that, in the absence of evidence to the contrary, it must be deemed to be signed in accordance with the rules and regulations of the company. Held, also, (1), defendants as re-insurers were not bound by the plaintiffs' settlement with the owner or the acceptance of the notice of abandonment, and that as to them there had been no total loss and no valid abandonment; (2) defendants were liable as upon a general average for expenses incurred by plaintiffs as salvors and insurers in saving the ship, after deducting the proportion to be borne by the owners of the vessel and cargo, &c.; (3) there was no particular average for which defendants were liable to contribute. The pleadings were directed to be amended according to the findings; and the costs apportioned. *The Phoenix Ins. Co. v. The Anchor Ins. Co.*, 4 O. R., C. P. D. 524.

6. Loss of Freight.

The plaintiffs were insurers of a cargo of grain, and the defendants insurers of both hull and freight of the vessel, which was owned by M. The vessel sank during the voyage and damaged the grain. Both the owner and the plaintiffs thought it more prudent to take the cargo to Buffalo, as being more saleable there than in Kingston, its original destination. M. however refused to deliver it to the plaintiffs until his freight was paid in full, and the plaintiffs thereupon paid it, and took an assignment of his policy on the freight, on which they now sued the defendants. It was found as a fact at the trial that the cargo might have been taken to its destination in specie, and the freight earned:—Held, affirming the decision of the Common Pleas, 30 C. P. 579, that the plaintiffs were not entitled to recover; for their only rights were those of M., who had suffered no loss for which the defendants were liable, inasmuch as the freight had not only not been lost by the perils insured against, but had not been lost at all, he having received it in full. *Anchor Marine Ins. Co. v. Phoenix Ins. Co.*, 6 A. R. 567.

V. WINDING UP INSURANCE COMPANIES.

An appeal under the Act respecting the winding up of joint stock companies, 41 Vict. c. 5, s. 27, O., cannot be entertained when security has not been given within eight days from the rendering of the final order or judgment appealed from. Where a bond good in form with proper sureties was filed with the clerk of the County Court, on the last of the eight days, though not allowed by the judge:—Held, to be within the words, "given security before a judge," and a sufficient compliance with the Act, though a person thus filing a bond without allowance, risks being deprived of his right of appeal in the event of the bond proving defective. The Act applies to an insurance company incorporated by the Province of Ontario, notwithstanding that R. S. O., c. 160,

provides a separate mode of distributing the deposit made by the company with the Provincial Treasurer. An order for compulsory winding up may be made under section 5, notwithstanding a resolution had been passed by the shareholders of the company, providing for the voluntary winding up of the affairs thereof under the supervision of the directors of the company, and a committee of shareholders appointed by them for that purpose. This not being an extraordinary resolution under s. 4, sub-s. 3, under the circumstances appearing in the judgment:—Held, that the discretion of the judge appealed from had not been improperly exercised. *Re Union Fire Ins. Co.*, 7 A. R. 783.

See also Sub-head I. 1, p. 352.

INTEREST ON MONEY.

I. WHEN ALLOWED.

1. *Generally*, 385.
2. *From What Time*, 387.
3. *At What Rate*, 387.
4. *On Judgments*.—See JUDGMENT.
5. *On Mortgages*.—See MORTGAGE.
6. *On Sale of Land*.—See SALE OF LAND—SALE OF LAND BY ORDER OF THE COURT.

II. LIABILITY OF EXECUTORS AND ADMINISTRATORS.—See EXECUTORS AND ADMINISTRATORS.

I. WHEN ALLOWED.

1. *Generally*.

In an action against the sureties of an absconding assignee in insolvency, on the assignee's bond to the Queen under the statute, a verdict was entered at the trial for \$800, subject to a legal question, which was afterwards decided in favour of the plaintiff. It was agreed by the parties that in case of such a decision, the amount for which the verdict should be entered was \$700:—Held, that the verdict was not for a debt or sum certain within R. S. O. c. 50, s. 269, and that it should not carry interest from its entry. *Woodruff v. Canada Guarantee Co.*, 8 P. R. 532.—Hagarty.

Under 31 Vict. c. 12, and 37 Vict. c. 13, the Minister of Public Works of the Dominion of Canada appropriated to the use of the Dominion certain lands in Yarmouth County, known as "Bunker Island." In accordance with said Acts, on the 2nd April, 1875, he paid into the hands of W., prothonotary at Halifax, the sum of \$6,180 as compensation and interest, as provided by those Acts, to be thereafter appropriated among the owners of the said island. This sum was paid at several times, by order of the Supreme Court of Nova Scotia, to one A., as owner, to one G., as mortgagee, and to others entitled, less ten dollars. As the money had remained in the hands of W., the prothonotary of the court, for some time, H. attorney for G., applied to the Supreme Court for an order of the

court calling upon W., the prothonotary, to pay over the interest upon G.'s proportion of the moneys, which interest (H. was informed) had been received by the prothonotary from the bank where he had placed the amount on deposit. W. resisted the application on the ground that he was not answerable to the proprietor of the principal, or to the court, for interest, but did not deny that interest had been received by him. A rule nisi was granted by the court and made absolute, ordering the prothonotary to pay whatever rate of interest he received on the amount:—Held, That the prothonotary was not entitled to any interest which the amount deposited earned while under the control of the court. That in ordering the prothonotary to pay over the interest received by him, the court was simply exercising the summary jurisdiction which each of the superior courts has over all its immediate officers. (Fournier and Henry, JJ., dissenting.) *Wilkins v. Geddes*, 3 S.C.R. 203.

Allowance of interest on money paid into court as security on appeal. See *The Citizens Ins. Co. v. Parsons et al.*, 32 C. P. 492 p. 175.

On the 19th October, 1866, the owner of real estate granted an annuity thereof of \$40, with power of distress in case of default. Only one year's annuity was paid, and in October, 1877, the grantor, by writing, acknowledged the amount then due. On a bill filed by the annuitant, claiming ten years' arrears, with interest thereon:—Held, that the power of distress was not such a penalty as took the case out of the general rule that interest will not be allowed on arrears of an annuity; and that notwithstanding the written admission by the grantor of the amount due under the deed, the annuitant could recover only six years' arrears without interest, as against a puisne incumbrancer who had duly registered his conveyance. *Crone v. Crone*, 27 Chy. 425.

Held, in this case, that the plaintiff, who had made improvements under mistake of title, was entitled to interest, from the time the money was expended, on the amount by which the value of the property was found to be thereby enhanced. *Fawcett v. Burwell*, 27 Chy. 445.

Interest may be allowed on a solicitor's bill of costs, if a demand in writing is made for it. *In re McClive et al., Solicitors*, 9 P. R. 213.—Wilson.

The axing officer has no power to allow interest, unless the matter has been specially referred to him by the order for taxation. *Id.*

Held, following *Quinlan v. Gordon*, 20 Chy. App. I., that overcharges beyond the lawful rate of interest, if paid, cannot be recovered back, or applied in reduction of a debt claimed to be due. *Hutton v. Federal Bank*, 9 P. R. 568.—Hodgins, Master.

The circumstances under which interest on a claim ought to be allowed or refused in the master's office considered and acted on. *Re Ross*, 29 Chy. 385.

After payment by an insolvent's estate of 100 cents in the dollar the creditors claimed interest on their claims out of a surplus in the hands of the assignee:—Held, reversing the decision of the court below, that notwithstanding the provisions of sec. 99 of the Insolvent Act, interest

was payable on all debts originally bearing interest by contract or otherwise, but not where it was claimable by law as damages only. *In re McDougall*, 8 A. R. 309.

2. From What Time.

Interest allowed from the time when the last call on stock became due. See *Provincial Ins. Co. v. Cameron*, 31 C. P. 523, p. 137.

Where in a sale under a decree no undue delay in investigating the title is attributed to either party, interest upon purchase money is payable only from the date of the acceptance of the title, and not from the time named in the conditions of sale. *Harrison v. Joseph*, 8 P. R. 293.—Stephens, *Referee*.

Interest on legacy. See *Toomey v. Tracey*, 4 O. R. 708.

3. At What Rate.

The rate of interest on certain municipal debentures was 7 per cent. :—Held, that sec. 217 of 29-30 Vict. c. 51 has not been repealed, though marked effete in the schedule prefixed to and not re-enacted in 36 Vict. c. 48, Ont., and that the above rate was therefore lawful. *Scottish American Investment Co. v. Corporation of the Village of Elora*, 6 A. R. 628.

A pawnbroker, under Con. Stat. C. c. 61, may legally charge any rate of interest that may be agreed upon between him and the pledgor. *Regina v. Adams*, 8 P. R. 462.—Cameron.

INTERNATIONAL BRIDGE COMPANY.

Held, that the International Bridge Company was under Canadian Act, 20 Vict., c. 227, s. 16, entrusted with a general and unqualified power of making by-laws and regulations as to the use of its bridge and the terms on which it should be used in point of payment; and that there is nothing in sec. 2 of the amending Act (22 Vict., c. 124), when read and construed together with the principal Act, which cuts down that power as to the regulation of the use of the bridge and as to the terms on which it may be used by railway trains. As to the reasonableness of charges, the principle is not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. *Canada Southern Railway Co. v. International Bridge Co.*, 8 App. Cas. 723; *S. C.*, 7 A. R. 226; 28 Chy. 114.

See also *The Attorney-General v. The International Bridge Co.*, 27 Chy. 37; 6 A. R. 537, pp. 342, 343.

INTERNATIONAL LAW.

I. EXTRADITION—See EXTRADITION.

II. FOREIGN DIVORCE—See HUSBAND AND WIFE.

INTERPLEADER.

I. WHEN RELIEF GRANTED.

1. *To Sheriff*, 388.
2. *Between Co-Sureties*, 388.

II. JURISDICTION OF COUNTY COURT, 388.

III. PRACTICE, 388.

IV. COSTS, 389.

V. IN DIVISION COURTS—See DIVISION COURTS.

I. WHEN RELIEF GRANTED.

1. *To Sheriff*.

At the instance of a sheriff, an interpleader order was granted and issues tried to determine the rights of certain claimants to goods seized by him in execution. Previously to the order being granted, the landlord of the premises laid claim to the goods, which claim the sheriff did not mention when applying for the order :—Held, that after the trial of the issues, the sheriff was not entitled to a second interpleader to test the landlord's claim, as this should have been disposed of on the first application. *Clarke v. Farrell*, 8 P. R. 234.—Dalton, Q. C.

2. *Between Co-Sureties*.

Quære whether interpleader is a proper remedy for trying the right to securities as between co-sureties. See *Trerice v. Burkett*, 1 O. R. 80.

II. JURISDICTION OF COUNTY COURT.

Held, that interpleader being a proceeding in the action, a County Court judge under Rule 422, O. J. Act, has jurisdiction to entertain it, but in this case the judge having disposed of the matter summarily without the consent of the parties, an issue was directed. *Coulson v. Spiers*, 9 P. R. 491.—Osler.

III. PRACTICE.

Held, that in case of interpleader by a sheriff between two claimants, one a plaintiff in a Superior Court suit, the other a plaintiff in a County Court suit, the application for an interpleader order was properly made in the Superior Court, although the seizure was made under the County Court writ before the Superior Court writ came into the sheriff's hands. *Strange v. Toronto Telegraph Co.*, 8 P. R. 1.—Dalton, Q. C.

Held, in an interpleader suit, that a married woman was not a proper surety, and time was given to substitute another surety for her. *Mullin v. Pascoe*, 8 P. R. 372.—Dalton, Q. C.

In an interpleader issue the claimant claimed under his purchase from the chattel mortgagee, and the issue was found against him :—Held, that he could not afterwards set up another title in the same issue, but that this was matter for a substantive application to the court. *Barker v. Leeson*, 1 O. R., Chy. D. 114.

Where there has been a trial by jury in an interpleader issue directed from the Chancery Division, an application for a new trial must be made to the Divisional Court, and not to a single Judge. *Cole v. Campbell*, 9 P. R. 498.—Boyd.

See *Canadian Bank of Commerce v. Tasker*, 8 P. R. 351, *infra*.

IV. COSTS.

Several executions from different county courts having been placed in the sheriff's hands:—Held, on an interpleader application to the superior court, that all costs, including those of the sheriff, should be taxed on the county court scale. *Masuret v. Lansdell*, 8 P. R. 57.—Dalton, Q. C. See next case.

In an interpleader matter where several writs were placed in the sheriff's hands, one from a county court, the others from the superior courts, a successful claimant was—Held entitled to superior court costs, as against the county court execution creditor:—Held, also, that where all the writs are from county courts, the sheriff is entitled to county court costs only; but a successful party to the issue is entitled to superior court costs. *Masuret v. Lansdell*, 8 P. R. 57, remarked upon and modified. *Phipps v. Beamer*, 8 P. R. 181.—Dalton, Q. C.

A sheriff having made a seizure of goods under a writ of execution, which seizure the execution creditor had not specially directed, and a claimant to the goods having appeared, the execution creditor refused to allow the sheriff to withdraw. On the return of an interpleader summons obtained by the sheriff, the execution creditor abandoned his claim:—Held, that the execution creditor might abandon at that stage of the proceedings without costs, and no order was made as to the costs of the sheriff. *Canadian Bank of Commerce v. Tasker*, 8 P. R. 351.—Osler.

Where a mortgagee claimed all the goods seized by a sheriff under execution, but it appeared on the trial of an interpleader issue between the mortgagee and the execution creditors that some of the goods seized amounting to one-sixth of the total value were not covered by the mortgage:—Sembler, although the mortgagee was entitled to the general costs of the issue, a deduction of one-sixth should be made in respect of the goods as to which he failed. *Segsworth v. Meriden Silver Plating Co.*, 3 O. R., Chy. D. 413.

An execution for \$105, issued from the Chancery Division, and certain goods were seized, which the plaintiff herein claimed, but on an interpleader issue he failed to establish his claim:—Held, that costs on the lower scale only should be taxed by the successful party on the issue. The effect of rule 2, O. J. Act, is to apply to all Divisions the practice which existed as to interpleader in the former Common Law Courts, plus the special power conferred on these latter courts by 44 Vict. c. 7, O. And all interpleader issues involving under \$400, in whatever Division arising, are now to be disposed of by reference to County Courts, and costs awarded according to 44 Vict. c. 7 s. 3, O. The judge who settles the question of these interpleader costs may direct what scale shall be followed. *Beaty v. Bryce*, 9 P. R. 320.—Dalton, *Master*.—Boyd. See the two next cases.

Where execution issued out of the High Court of Justice, C. P. D., and the sheriff under R. S. O. c. 54, s. 10, obtained an interpleader order, under which an issue between the parties was directed to be tried in the County Court, under 44 Vict., c. 7, O.:—Held, that the sheriff was entitled to his costs under the interpleader order to be taxed on the scale of the court out of which the process under which he seized the goods issued. Sembler, that the parties to the issue should also have their costs prior to the order directing the issue on the superior court scale. *Beaty v. Bryce*, 9 P. R. 320, explained. *Arkell et al v. Geiger*, 9 P. R. 523.—Cameron.

Under an execution issued from the Queen's Bench Division, a sheriff seized certain goods, some of which, valued at \$110, were claimed by the plaintiff. The master in Chambers, on the application of the sheriff, directed an interpleader issue in the Queen's Bench Division, reserving the question of costs, which he subsequently directed to be taxed on the County Court scale following *Beaty v. Bryce*, 9 P. R. 320:—Held, (1) That the master's discretion, exercised under the jurisdiction derived from, R. S. O. c. 39, s. 29, and Rule 420, O. J. Act, is open to review by an appeal to a judge in Chambers, under Rule 427, O. J. Act. (2) That the scale of costs after the issue on an interpleader, must be determined by the scale applicable to the forum in which the issue has to be tried, and before the issue, on the scale of the court to which the sheriff is compelled to resort to obtain relief. *Beaty v. Bryce*, 9 P. R. 320, not followed. *Christie v. Conway et al.*, 9 P. R. 529.—Cameron.

A successful party in an interpleader issue moving for an order barring the execution creditors, having given the sheriff notice of the motion, was ordered to pay the sheriff's costs of appearing on the motion, for such notice is unnecessary. *O'Brien v. Bull*, 9 P. R. 494.—Dalton, *Master*.

INTERPRETATION OF WORDS AND TERMS.

See WORDS.

INTERROGATORIES.

See EVIDENCE.

INTESTATE.

- I. ADMINISTRATOR OF.—See EXECUTORS AND ADMINISTRATORS.
- II. ADMINISTRATION SUIT.—See EXECUTORS AND ADMINISTRATORS.
- III. STATUTE OF DISTRIBUTIONS.—See DISTRIBUTION OF ESTATE.

INTIMIDATION.

Of workmen—Restraining by injunction. See *Hynes v. Fisher*, 4 O. R. 60, 78, pp. 37, 348.

INVESTMENT OF MONEY.

Held, that it is a breach of duty in a person entrusted with money to invest on real estate to invest on the security of a second mortgage, unless with the sanction of the lender, which such person must prove, and which the evidence in this case failed to establish. The value of the property herein was about \$1,000; the first mortgage being for \$325, and the second for \$400, taken to the plaintiff. The borrower was a respectable mechanic in receipt of good wages, occupying the property himself, which was situated in the place where all the parties resided and carried on business. The learned judge at the trial found that the defendant was not guilty of negligence so far as the value was concerned, and the court refused to interfere. Remarks as to the proper form of declaration in such case, where the defendant was not paid by the lender but by the borrower. *Carter v. Hatch*, 31 C. P. 293.

Upon the conflicting evidence, set out in the report, the learned judge at the trial found that the plaintiff had not been informed of the first mortgage, under which the property was sold, leaving only about \$60 applicable to the second mortgage. The court refused to set aside this finding, and sustained the verdict for the plaintiff. 16.

Investment of money by executors and administrators. See *Killins v. Killins*, 29 Chy. 472; *Burritt v. Burritt*, 27 Chy. 143.

JOINDER OF PARTIES.

See PLEADING.

JOINT STOCK COMPANY.

See CORPORATIONS.

JOINT TENANTS.

See ESTATE.

JUDGE.

I. OF COUNTY COURT—See COUNTY COURT.

II. OF DIVISION COURT—See DIVISION COURT.

III. IN CHAMBERS—See PRACTICE.

JUDGMENT.

I. ENTERING JUDGMENT UNDER O. J. ACT, 1881.

1. *Service of Notice of Motion*, 392.

2. *Under Rule No. 78*, 392.

3. *Under Rule No. 80*, 392.

4. *Under Rule No. 321*, 393.

5. *Under Rule No. 322*, 393.

6. *Under Rule No. 324*, 393.

7. *Other Cases*, 394.

II. INTERLOCUTORY JUDGMENT, 394.

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IX. ENFORCING JUDGMENT OF COURT OF APPEAL—See COURT OF APPEAL.

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XII. FRAUDULENT JUDGMENTS—See FRAUDULENT JUDGMENT.

XIII. REVIVING JUDGMENTS—See SCIRE FACIAS AND REVIVOR.

I. ENTERING JUDGMENT UNDER O. J. ACT, 1881.

1. *Service of Notice of Motion*.

Where a defendant does not appear, notice of motion for judgment must nevertheless be served or posted in the proper office under Rule, 131 O. J. Act. *Burritt v. Murdock*, 9 P. R. 191.—Proudfoot.

2. *Under Rule No. 78*.

An action for foreclosure of a mortgage is governed by Rule 78, and no order allowing service is necessary, and on default of appearance judgment may be entered on præcipe according to the former practice in Chancery. *Chamberlain v. Armstrong*, 9 P. R. 212.—Boyd.

3. *Under Rule No. 80*.

A writ was endorsed as follows:—"The plaintiff's claim is for the price of goods supplied." The following are the particulars:—"£621.06 for money payable by the defendant to the plaintiff for goods bargained and sold, and sold and delivered by the plaintiffs to the defendant, and interest thereon from the 25th of July, 1882":—Held, that the endorsement was not a sufficient special endorsement to entitle the plaintiff to ask for judgment under Rule 80, O. J. Act. *Lucas v. Ross*, 9 P. R. 251.—Dalton, Master.

The endorsement on the writ was as follows:—"The plaintiffs claim \$2,000 being the amount of the defendant's overdrawn account with the plaintiffs' bank on the 18th September, 1882":—Held sufficient. *Imperial Bank v. Britton*, 9 P. R. 274.—Dalton, Master.

The writ was endorsed for the price of land which the plaintiff had agreed to sell to the defendant. A motion for judgment under Rule 80, O. J. Act, was refused. Such a claim cannot be specially endorsed. *Hood v. Martin*, 9 P. R. 313.—Dalton, Master.

The power given by Rule 80, O. J. Act, to sign judgment should be most carefully and sparingly exercised in cases where the defendant makes an affidavit of merits, and disputes the claim, and

should never be exercised unless it is shewn that the plaintiff may be seriously prejudiced by the delay in awaiting the ordinary modes of trial, nor in any case in which, under the old practice, final judgment could not have been signed for want of appearance. On the facts stated in the report, an order of the Master in Chambers, directing the entry of final judgment under such rule, was set aside on appeal. *Barber v. Russell*, 9 P. R. 433.—Cameron.

The order for security for costs under Rule 431, O. J. Act, is a stay of proceedings, and a judge has no power to set it aside when once properly issued and sign final judgment under Rule 80, O. J. Act. *The Bank of Nova Scotia v. La Roche, et al.* 9 P. R. 503.—Cameron.

4. Under Rule No. 321.

Under Rule 321, O. J. Act, the court may, upon motion for judgment or for a new trial, if satisfied that it has before it all the materials necessary for finally determining the question in dispute * * give judgment accordingly, but * * Per Wilson, C. J.—Unquestionably that power must be most sparingly and cautiously exercised. *Stewart v. Rounds*, 7 A. R. 515.

5. Under Rule No. 322.

The defendant in an action on a judgment obtained in Iowa, U. S. A., pleaded denying the recovery of the judgment. Upon a motion for judgment under Rule 322, upon the pleadings verified by affidavit, and the production of an exemplification of the judgment:—Held, affirming the opinion of the master, that judgment could not be ordered on these materials under Rule 322, the defendant having put the judgment distinctly in issue. In proceeding under the Rule 322 it is not sufficient to produce a document on which the plaintiff relies, without any proof to connect the defendant with it or to support its genuineness. *Henebery v. Turner*, 2 O. R., Q. B. D. 284.

In an action for the recovery of land the plaintiff may obtain an order to sign final judgment under Rule 322, upon an admission of the defendant in his examination. *Trust and Loan Co. v. Hill*, 9 P. R. 8.—Dalton, Master.

6. Under Rule No. 324.

The judge sitting in Chambers has no jurisdiction to order judgment to be signed under Rule 324 (a), but a motion for judgment thereunder must be made to the court. *Morrison v. Taylor*, 46 Q. B. 492.

Where it appears that defendant has no defence, and has made, or is intending to make a fraudulent disposition of his property, or is so dealing with it as to embarrass the plaintiff in reaching it by execution, the court will, on motion, under rule 324, upon a proper case being made, order judgment and immediate execution. In the event of other executions being obtained against the debtor's property before the time at which the plaintiff would be entitled to issue executions as on a judgment in default of appearance, and the amount realized being insuffi-

cient to satisfy all parties, a ratable division should be made. *Kinloch v. Morton*, 9 P. R. 38.—Osler.

Where there were cross-actions, in one of which a sum had been reported due and a claim of set-off had been disallowed, in a subsequent action brought to recover the sum disallowed, the plaintiff was held entitled to move for judgment under Rule 324. But the affidavits filed on the motion being conflicting:—Held, the action must be entered for trial at the sittings for the examination of witnesses, but the amount found due in the first action was ordered to be paid into Court, to abide the result of the second action. *Francis v. Francis*, 9 P. R. 209.—Proudfoot.

In an action for the rectification of a deed and for a declaration that the plaintiff was entitled to a right of way, and for an injunction restraining defendant from interfering therewith. The endorsement stated the relief claimed. The defendant who did not appear within the time limited, subsequently entered an appearance, but did not serve any notice thereof:—Held, on motion for judgment under Rule 324, O. J. Act, that a statement of claim must be filed. *Hunter v. Wilcockson*, 9 P. R. 305.—Ferguson.

A person of the same name as the defendant served by mistake with the writ in the action was held entitled to his costs of opposing a motion for judgment under Rule 324, O. J. Act. *Lucas v. Fraser*, 9 P. R. 309.—Osler.

7. Other Cases.

When an action is commenced in a local office, judgment for default of appearance or pleading must be entered in the local office. *Chamberlain v. Armstrong*, 9 P. R. 212.—Boyd.

An action was transferred from the Chy. Div. to the C. P. Div. by an order of the judges, but the plaintiff not having notice of the transfer signed judgment in the Chy. Div. An order was made retransferring the case to the Chy. Div., and allowing the judgment entered to stand and be in force from its entry, without costs. *Patterson v. Murphy*, 9 P. R. 306.—Dalton, Master.

Where the only property the defendant owned was the equity of redemption in certain lands, on motion for judgment for the amount of the plaintiff's claim and for a decree for sale of the equity of redemption:—Held, on the authority of *Kerr v. Styles*, 26 Chy. 309, that the plaintiff could have judgment as asked notwithstanding that in this case there were no fi. fas. in the sheriff's hands. *Johnson v. Bennett*, 9 P. R. 337.—Proudfoot.

II. INTERLOCUTORY JUDGMENT.

Held, that in an action commenced by a writ not specially endorsed, where the defendant does not plead to the declaration, the plaintiff must sign interlocutory judgment against the defendant before he is in a position to serve notice of trial and assessment of damages. *Fenwick v. Donohue*, 8 P. R. 116.—Dalton, Q. C.

See also, *Johnston v. Christie et al.*, 31 C. P. 358.

III. SETTING ASIDE JUDGMENT.

Semble, the question of the validity of a judgment should not be argued on the return of a garnishee summons, but should be raised on an application to set aside the execution. *Elliot v. Capell*, 9 P. R. 35.—*Dalton, Master*.—Osler.

Twenty-two months after judgment had been signed in an action on promissory notes for want of a plea and execution issued, and the defendant examined as a judgment debtor, leave was refused to set aside the judgment, and amend the declaration by charging the defendant with fraud, within the meaning of the Insolvent Act of 1875. *Lightbound v. Hill*, 9 P. R. 295.—*Dalton, Master*.

See *Ryan v. Fish et al.*, 9 P. R. 458, p. 227. See also *Watson v. Ketchum*, 2 O. R. 237; *Corporation of Town of Dundas v. Gilmour et al.*, 2 O. R. 463.

IV. EFFECT OF JUDGMENT IN EVIDENCE.

D., the purchaser of land, gave a mortgage thereon to secure part of the purchase money, and subsequently allowed taxes to accumulate on the land, which was sold in order to realize such taxes when D. bought it and obtained the usual deed to himself. D. having made default in payment of the mortgage, proceedings at law were instituted thereon, pending which D. conveyed this and other property to his two sons, who gave a mortgage back securing the support and maintenance of D. and his wife, and the plaintiff, after recovering judgment, filed a bill impeaching the transaction for fraud:—Held, (1) that upon the evidence the transaction was fraudulent and void as against creditors; (2) that although ordinarily the production of the exemplification of a judgment at law is admissible, and has been generally received as evidence of a debt due the plaintiff against all parties in suits under the statute of Elizabeth, yet that the judgment so recovered by the plaintiff against D. was not evidence against the sons, being *res inter alios judicata*. *Allan v. McTavish*, 28 Chy. 539. See *S. C.*, 8 A. R. 440.

V. ESTOPPEL BY FORMER JUDGMENT.

Where a judgment has been recovered for a debt without fraud being charged under s. 136 of the Insolvent Act of 1875, the plaintiff is barred by such recovery from bringing another action against the debtor charging the fraud, even although the judgment was recovered by default, for the plaintiff might have declared, averring such fraud, and had the question tried. *Lightbound v. Hill*, 32 C. P. 249.

Effect of judgment in appellate court where the judges were equally divided. See *In re Hall*, 32 C. P. 498; 8 A. R. 135 p. 178.

A judgment in favour of the plaintiff in an action for trespass to lands upon pleas (amongst others) of lands not plaintiff's and *liberum tenementum*, is not a complete estoppel, preventing the defendant in another suit, from questioning the plaintiff's title to any part of the lands. The judgment is only an estoppel with regard to the title of that portion of the land upon which it

had been shewn that the defendant had trespassed. *Hunter v. Birney*, 27 Chy. 204.

S. being the holder of two mortgages, brought ejectment thereon, when the genuineness of the signatures to the instruments was disputed, notwithstanding which he recovered judgment in that action, and subsequently instituted proceedings in this court seeking to obtain a sale of the mortgage premises and the usual order for deficiency. Owing to the extremely contradictory evidence adduced at the hearing, the court [Spragge, C.] refused to make the decree as asked, holding the evidence insufficient to establish the execution of the mortgages, as the plaintiff was bound to do, and dismissed the bill, with costs; but without prejudice to S. filing another bill if so advised, within twelve months from the date of that decree. After the lapse of more than twelve months the mortgagor filed a bill seeking to have the mortgages delivered up to be cancelled:—Held, that if the strict construction of such decree was that the point was *res judicata* it was erroneous, and the court (Spragge, C.) refusing to enforce it in this proceeding by making a decree in favour of the plaintiff, dismissed the bill with costs. *Mitchell v. Strathy*, 28 Chy. 80.

A former suit had been instituted by the plaintiff which had been dismissed, as the plaintiff had not acquired the legal estate until after the bill was filed:—Held, that under such circumstances the question was not *res judicata*. *Adamson v. Adamson*, 28 Chy. 221.

On proceeding with the reference under the decree pronounced on the hearing, as reported 28 Chy. 356, the Master by his report found that there was due to the plaintiff \$1,104.99, which included a sum of \$171.32 costs incurred in the suit brought by him to redeem:—Held, on appeal, affirming the report of the Master—(1) that the plaintiff was entitled to claim the costs so incurred, that proceeding having been taken in reality in defence of his rights as owner of an equity of redemption with the concurrence of C., through whom the appellant claimed—and, (2) that neither of the defendants could dispute the findings in that suit, but were estopped from questioning the amount found due therein to the same extent as Jarvis under whom they claimed would have been, the proceeding being not in respect of a matter collateral to the mortgage in question in that suit, but virtually upon the same instrument, and that therefore the rule as to estoppel by deed applied. *Pierce v. Canavan*, 29 Chy. 32.

An action will not lie against an incorporated bank for breach of warranty on the sale of a horse-power machine. In an action in the Division Court against the now plaintiff, on notes given by him for the price of a machine, the question of the warranty was tried and decided against the now plaintiff:—Held, that the matter was *res judicata*, and the judgment in the Division Court was therefore a good defence, by way of estoppel, to the present action. *Radford v. The Merchants Bank*, 3 O. R., C. P. D. 529.

See *Davidson v. The Belleville and North Hastings R. W. Co.*, 5 A. R. 315 p. 168; *Hunter v. Vanstone*, 7 A. R. 750, p. 217. *Re Donovan-Wilson v. Beatty*, 29 Chy. 280 p. 45; *Bank of Montreal v. Haffner et al.*, 3 O. R. 183, p. 148.

VI. INTEREST ON JUDGMENTS.

Section 43 of the Court of Appeal Act, which provides "when on an appeal against a judgment in any action personal, the Court of Appeal gives judgment for the respondent, in interest shall be allowed by the Court for such time as execution has been delayed by the appeal," does not apply to a case where the judgment of the court below is in favour of the defendant, and is reversed on appeal. In such case the court, on reversing the judgment, gave liberty to the appellant, the plaintiff in the court below, to move to be at liberty to enter judgment as directed by this court, *nunc pro tunc*, whereby he would be enabled to recover interest on the amount of the verdict rendered in his favour. *Quinlan v. Union Fire Ins. Co.*, 8 A. R. 376.

[See 47 Vict. c. 10, s. 4.]

VII. FOREIGN JUDGMENTS.

Under 22 Vict. c. 5, s. 58, consolidated in C. S. L. C. c. 83, s. 53, sub-s. 2, a judgment may be recovered in the Province of Quebec, on a personal service in Ontario, in an action in which the cause thereof arose in Quebec, so as to render such judgment conclusive on the merits. A note made in Ontario, payable at a particular place in Quebec, is a contract deemed to be made in Quebec, the place of performance, and under C. S. C. c. 57, s. 4, is payable at the place named therein, the C. S. U. C. c. 42, requiring the use of the restrictive words, "not otherwise or elsewhere," applying only to notes made and payable in Ontario. The note in this case was made in Toronto, payable at the Mechanics' Bank, Montreal, and was sent to Montreal, and there held until maturity, when it was presented for payment and dishonoured:—Held, that the contract being performable in Quebec, and the breach occurring there, the cause of action arose there, so as to bring the defendant within the operation of 22 Vict. c. 5, s. 58, and to make a judgment recovered against him in Quebec, on a personal service in Ontario, conclusive on the merits; and the defendant was therefore precluded from setting up a defence on the merits, and was allowed to except to the jurisdiction only. *Court v. Scott*, 32 C. P. 148.

The plaintiff sued the defendant on a foreign judgment for \$240, and specially endorsed this amount upon the writ of summons. He obtained judgment in default of appearance:—Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O. c. 50, s. 153, and that the plaintiff was entitled to Superior Court costs. *Davidson v. Cameron*, 8 P. R. 61.—Dalton, Q. C.

To an action on a foreign judgment, the defendant pleaded that he was not at the time of the commencement of the action or previously resident or domiciled within the jurisdiction of the foreign court, or a subject of that country, and that he was not served with process in the action, and had no notice of it or opportunity of defending himself. On motion to strike out such defence as false defendant admitted in his examination that he had heard of some claim being made by the plaintiff, through a letter from his brother living in the United States, that he wrote to his brother to employ some one to attend to it,

and sent a statement of that matter to him, but that he never heard of the action or trial until after judgment, when he was informed of it, and that his property in the United States had been attached to pay it. It appeared that an appearance had been entered for him there by a firm of lawyers. The application was refused. *Schihsby v. Westenholz*, L. R. 6 Q. B. 155, followed. *Beaty v. Cromwell*, 9 P. R. 547.—Winchester, Registrar.—Armour.

See *Henebery v. Turner*, 2 O. R. 284, p. 393.

VIII. ACTIONS ON JUDGMENTS.

See *Beaty v. Cromwell*, 9 P. R. 547, *supra* *Henebery v. Turner*, 2 O. R. 284, p. 393.

JURISDICTION.

- I. OF COURTS.—See THEIR SEVERAL TITLES.
- II. OF JUDGE IN CHAMBERS.—See PRACTICE.
- III. OF MASTER.—See PRACTICE.

JURY.

I. IN CIVIL CASES.

1. *Jury Notice*, 398.
2. *Questions Submitted to and Findings by Jury*, 399.
3. *Assessment of Damages*, 400.
4. *Withdrawal of Juror*, 400.
5. *Verdict*—See *Verdict*.

II. IN CRIMINAL CASES.—See CRIMINAL LAW.

I. IN CIVIL CASES.

1. *Jury Notice*.

With his joinder of issue, the plaintiff served notice of trial for the Chancery sittings. Defendant afterwards served a similitur and jury notice:—Held, that the similitur and jury notice were good, and that the notice of trial must be set aside. *McLaren v. McCuaig*, 8 P. R. 54.—Dalton, Q. C.

In ejectment where equitable issues are raised under R. S. O. c. 50, s. 257, the issues must be tried without a jury. *Bryan v. Mitchell*, 8 P. R. 302.—Dalton, Q. C.—Armour.

The plaintiff joined issue upon defendants' pleas, and at the same time filed a similitur, without a jury notice, for the defendant. Afterwards the defendant filed a second similitur, and with it a jury notice:—Held, that the defendant should have filed a jury notice with his pleas; that the first similitur was good, that the second was unnecessary, and must, together with the jury notice, be struck out as bad. *Hyde v. Casmea*, 8 P. R. 137.—Dalton, Q. C.

An order directed the trial of an issue in an interpleader matter. The plaintiff served the issue but did not serve with it a jury notice as required by R. S. O., c. 54 s. 4. He subsequently served a jury notice with the notice of trial. The

defendant did not appear at the trial, and a verdict was rendered for the plaintiff, who afterwards obtained, (on notice), in Chambers an order for costs:—Held, on appeal affirming this order, that the verdict obtained on the trial by a jury was not a nullity, but only irregular, and not being moved against promptly should stand. *Leeson v. Lemon*, 9 P. R. 103.—Boyd.

Held that an action to set aside a conveyance could, previous to the O. J. Act, have been brought in the Court of Chancery only, and the defendant had therefore no right, as of course, to have the action tried by a jury. While under the old Chancery Act (R. S. O. c. 40, s. 99) the court might direct an action to be tried by a jury upon notice and for good cause, yet this could only be done by the court, and not by a judge or master in chambers. *Thurlow v. Beck*, 9 P. R. 268.—Patterson.

In cases in which, before the O. J. Act the Court of Chancery had exclusive jurisdiction, a jury notice is irregular and will be struck out. *Gowanlock v. Mans*, 9 P. R. 270.—Dalton, Master.

Where the cause of action was one of a purely common law character, and none of the defences or replies presented issues of a merely equitable character, *Boyd, C.*, reversed the order of a local master, striking out the defendant's jury notice. *Bank of British North America v. Eddy*, 9 P. R. 468.

If it were shewn that there was likely to be a great complexity of facts:—Semble, that such an element alone would not be a reason for dispensing with a jury in a common law cause of action. *Id.*

2. Questions Submitted to and Findings by Jury.

Held, that under R. S. O. c. 62, s. 10, any evidence adduced by a party interested against an executrix corroborating the evidence of the interested party in any particular, must be submitted to the jury as sufficient in point of law, the weight to be attached to it in point of fact being a matter for their consideration. *Parker v. Parker*, 32 C. P. 113.

In an action against a railway for injuries caused by a collision at a crossing, the jury in answer to the question, "If the plaintiffs had known that the train was coming would they have stopped their horse further from the railway than they did," said "Yes:—Held, that though this was not very definite, yet taken with the evidence on which the jury acted it was sufficient. *Rosenberger et al. v. The Grand Trunk Ry. Co.*, 32 C. P. 349.

Where a question was not put to the jury until after they had rendered their verdict and answered the other questions submitted to them, and after the learned judge had been moved for judgment upon those answers, but it was done while all the parties and their counsel were present and before the jury had left the court room;—Held, that the question had been properly put. *McLaren v. The Canada Central Ry. Co.* 32 C. P. 324.

The judge is not bound under the O. J. Act to submit questions in writing to the jury. *Lett v. The St. Lawrence and Ottawa Ry. Co.*, 1 O. R., Q. B. D. 545.

Held per Patterson, J. A., that it was not improper to leave to the jury the question whether the amount in this case was ascertained by the act of the parties. *Watson v. Severn*, 6 A. R. 559.

The R. S. O. c. 50, s. 264, makes it imperative upon the jury to answer questions submitted to them and prohibits them from giving a general verdict instead. But the judge after having put questions, may, nevertheless, in his discretion receive a general verdict. *Furlong v. Carroll*, 7 A. R. 145.

The new system of calling upon juries to reply to specific questions considered and discussed, and, per Hagarty, C. J., questioned. *The Canada Central Ry. Co. v. McLaren*, 8 A. R. 564.

3. Assessment of Damages.

Held, that in an action commenced by a writ not specially endorsed where the defendant does not plead to the declaration, the plaintiff must sign interlocutory judgment against the defendant before he is in a position to serve notice of trial and assessment of damages. *Fenwick v. Donohue*, 8 P. R. 116.

4. Withdrawal of Juror.

The withdrawal of a juror at the trial has the effect of concluding the suit, and with it, of determining the whole cause of action. *Flake v. Clapp*, 8 P. R. 62.—Dalton, Q. C.

JUSTICES OF THE PEACE.

I. QUALIFICATION AND APPOINTMENT, 400.

II. SUMMARY PROCEEDINGS BEFORE MAGISTRATE, 401.

III. JURISDICTION.

1. *Disqualification by Reason of Interest*, 401.
2. *Ousting Jurisdiction by Claim of Title*, 401.

IV. CONVICTION.

1. *Form and Requisites of*, 401.
2. *Amendment of*, 403.
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4. *Quashing*, 403.
5. *Appeals from*—See SESSIONS.
6. *Certiorari to bring up Convictions*—See CERTIORARI.

V. WARRANT FOR ARREST, 403.

VI. PROCEEDINGS AGAINST AND LIABILITY OF MAGISTRATES, 404.

VII. SESSIONS—See SESSIONS.

I. QUALIFICATION AND APPOINTMENT.

Held, that the Legislature of the Province of Ontario had power under No. 14 of sec. 92 B. N. A. Act to pass R. S. O. c. 71, providing for the qualification and appointment of justices of the peace. *Regina v. Bennett*, 1 O. R., Q. B. D. 445.

II. SUMMARY PROCEEDINGS BEFORE MAGISTRATE.

The defendant was convicted of a common assault, upon the complaint of the prosecutor, who verbally requested the magistrate to proceed summarily:—Held, that the request to proceed summarily need not be in writing. *Regina v. Smith*, 46 Q. B. 442.

III. JURISDICTION.

1. Disqualification by Reason of Interest.

Two of the four convicting justices were licensed auctioneers for the county, and persisted in sitting after objection taken on account of interest, though the case might have been disposed of by one justice:—Held, that they were disqualified, and in quashing the conviction on that ground also, the court ordered them to pay costs. *Regina v. Chapman*, 1 O. R., Q. B. D. 582.

2. Ousting Jurisdiction by Claim of Title.

Where the defendants had been convicted, under 32-33 Vict. c. 22, s. 60, of trespass to land, and it appeared on the evidence, before the magistrate set out in the report of the case, that there was a dispute between the parties as to the ownership:—Held, that it was a case in which the title to land came in question; and that the defendants had been improperly convicted, even though the magistrate did not believe that the defendant had a title, it not being within his province to decide on the title, but merely on the good faith of the parties alleging it. *Regina v. Davidson et al.*, 45 Q. B. 91.

The defendants were convicted of a trespass under C. S. U. C. c. 105, as amended by 25 Vict. c. 22. They appealed to the sessions, which affirmed the conviction. The conviction was then brought into this court, and a motion was made to quash it on the ground of want of jurisdiction in the convicting justice, inasmuch as it appeared by the evidence, and by affidavits filed, that the defendants acted under a fair and reasonable supposition that they had the right to do the acts complained of within the meaning of the above statutes:—Held, that that was a fact to be adjudicated upon by the convicting justice upon the evidence, and, therefore, that a certiorari would not lie for want of jurisdiction. *Regina v. Malcolm et al.*, 2 O. R., Q. B. D. 511.

IV. CONVICTION.

1. Form and Requisites of.

A conviction must be under seal. *In re Ryer and Plows*, 46 Q. B. 206.

The conviction adjudged payment of a fine and costs, and in default imprisonment:—Held, good; and that it was not necessary to order that a distress warrant to compel payment of the fine should be issued before imprisonment. *Regina v. Smith*, 46 Q. B. 442.

On motion to discharge a prisoner on habeas corpus on conviction before a police magistrate, the conviction charged that the prisoner did

“unlawfully and maliciously cut and wound one Mary Kelly, with intent then and there to do her grievous bodily harm”:—Held, that the addition of the words, “with intent to do grievous bodily harm,” did not vitiate the conviction, and that the prisoner might be lawfully convicted of the statutory misdemeanour of malicious wounding:—Held, also, that imprisonment at hard labour for a year was properly awarded under 38 Vict. c. 47. *Regina v. Boucher*, 8 P. R. 20.—Hagarty.

The defendant was convicted before a magistrate, for that he “did in or about the month of June, 1880, on various occasions,” commit the offence charged in the information; and a fine was inflicted “for his said offence”:—Held, that the conviction was bad, under 32-33 Vict. c. 21, s. 25, D., as shewing the commission of more than one offence. *Regina v. Clennan*, 8 P. R. 418—Wilson.

The original conviction was for “acting in a disorderly manner by fighting, and breaking the peace, contrary to the by-law and statute in that behalf;” imprisonment with hard labour was imposed in default of payment of the fine, and the costs were made payable in the alternative to the magistrate or the prosecutor:—Held, bad. *Regina v. Washington*, 46 Q. B. 221.

A by-law of a town provided that no one should use any waggon, &c., upon any of the streets of the town for drawing bricks, stones, &c., when the weight of the load should exceed 1500 pounds, unless the tires of the wheels were of a specified width, but the by-law was not to apply to any waggon conveying lumber or goods from the mill or manufactory thereof into the town if distant more than two miles from the town limits, nor to any person passing through the town in vehicles loaded with the said articles:—Held, bad, as discriminating against residents of the town in favour of others:—Held, also, that a conviction under such by-law was bad for not shewing that defendant was not a person passing through the town, and for imposing imprisonment with hard labour. *Regina v. Pipe*, 1 O. R., Q. B. D. 43.

The defendants were convicted for unlawfully assaulting F. V. “by standing in front of the horses and carriage driven by the said V., in a hostile manner, and thereby forcibly detaining him, the said V., in the public highway against his will.”—Held, that the conviction was bad in stating the detention as a conclusion and not as part of the charge, which, as shewn by the conviction, was merely standing in front of the horses, and did not amount to an assault. *Regina v. McElligott et al.*, 3 O. R., Q. B. D. 535.

On an application to the Divisional Court to quash a conviction made by the police magistrate, of the city of Toronto, against the defendant for keeping a house of ill-fame, there being evidence, as set out in the report of the case, upon which the magistrate could convict, the court refused to interfere. In the conviction the offence was stated to be against the statute in such case made and provided:—Held, that, if not constituted an offence under 32-33 Vict. c. 32, D., the reference to the statute might be treated as surplusage, and the conviction sustained under the common law; but that the reference to the statute might be supported, because sec. 17 im-

poses a punishment in some respects different from the common law. *Regina v. Flint*, 4 O. R., C. P. D., 214.

As to jurisdiction of magistrates to convict for gambling under 27 Geo. 3 c. 1. See *Regina v. Matheson*, 4 O. R. 559. p. 310.

See *Regina v. Clark*, 2 O. R. 523, p. 72; *Regina v. Walsh*, 2 O. R. 206, p. 99; *Regina v. Bennett*, 3 O. R. 45, p. 100; *Regina v. Wallace*, 4 O. R. 127, p. 100.

2. Amendment of.

Conviction under Canada Temperance Act, 1878. See *Regina v. Bennett*, 3 O. R. 45, p. 100.

Conviction under Liquor License Act, R. S. O. c. 181. See *Regina v. Albright*, 9 P. R. 25; *McLellan v. McKinnon*, 1 O. R. 219.

3. Memorandum of Conviction.

Held that the fact that the memorandum of conviction differed from the conviction as returned, in not providing for imprisonment in default of payment, did not invalidate the conviction, for it is sufficient if the penalty has been fixed at any time before the conviction is formally drawn up. *Regina v. Smith*, 46 Q. B. 442.

Held, the defendant, having had the certiorari directed to the magistrate who had convicted, was estopped from objecting that the conviction was in reality made by three, as appeared from the memorandum of conviction which was signed by them. *Ib.*

4. Quashing.

Held, that the validity of a by-law might be questioned on a motion to quash the conviction made under it. *Regina v. Cuthbert*, 45 Q. B. 19.

A warrant was issued by a magistrate for the apprehension of the defendant, who was brought before another magistrate thereon, convicted and fined. Subsequently the magistrate who had issued the warrant caused the defendant to be summoned before him for the same offence, and again convicted and fined him, after refusing to receive evidence of the prior conviction. The court quashed the second conviction, with costs:—Held, that, even assuming that the first conviction was void by reason of the defendant having been brought before a magistrate other than the one who issued the warrant, his appearance and pleading thereto amounted to a waiver, and at any rate the magistrate who convicted the second time could not take advantage thereof. *Regina v. Bernard* 4 O. R., Q. B. D. 603.

See *Regina v. Whelan*, 45 Q. B. 396, p. 105; *McLellan v. McKinnon*, 1 O. R. 219, p. 404; *Regina v. Clark*, 2 O. R. 523, p. 72. See also *Regina v. Grainger*, 46 Q. B. 382.

V. WARRANT FOR ARREST.

The warrant was issued in the United Counties of Northumberland and Durham, and was endorsed by a magistrate in the county of Peterborough, "This is to certify that I have endorsed

this warrant, to be executed in the county of Peterborough," but there was no proof of the hand-writing of the justice who issued the warrant or recital of such proof as required by 32-33 Vict. c. 30, s. 23, D., sch. K:—Held, that the warrant was therefore defective, and the arrest illegal, for which the defendant was liable in trespass. *Reid v. Maybee*, 31 C. P. 384.

VI. PROCEEDINGS AGAINST AND LIABILITY OF MAGISTRATES.

A magistrate acting under 32-33 Vict. c. 20, s. 37, D., convicted four persons for creating a disturbance thereunder, and imposed upon each a fine of \$5, but instead of severing the costs which he had charged, imposed the full amount thereof against each defendant, and received it from each:—Held, that under the circumstances, more fully set out in the report of the case, the overcharge must be deemed to have been wilfully made, so as to render the defendant liable to the penalty imposed in such cases by the R. S. O. c. 77, s. 4. *Parsons qui tam v. Crabbe*, 31 C. P. 151.

When an appeal was brought from a conviction imposing imprisonment with hard labour which the magistrate had no power to award, and the sessions amended the record by striking out "hard labour."—Held, Cameron, J., dissenting, that their assuming so to amend the conviction was not a quashing of a conviction, and therefore trespass would not lie against the justice. *McLellan v. McKinnon*, 1 O. R., Q. B. D. 219.

LACHES.

ENTITLING SURETY TO DISCHARGE—See PRINCIPAL AND SURETY.

Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor the latter is bound to use due diligence in enforcing payment thereof, and if through his default or laches the money secured thereby is lost it will be charged against the creditor and deducted from his demand. *Synod v. DeBlaquiere*, 27 Chy. 536.

Held, that under the facts stated in this case there had been no laches on the part of the company disentitling them to the debentures. *Re Grand Junction R. W. Co. v. County of Peterboro*, 45 Q. B. 302. Reversed on appeal, 6 A. R. 339.

Held, in this case, that by acquiescing in the sale of land, and by her laches the widow had waived her right to compensation for the loss of benefits bequeathed to her by her husband. See *Ripley v. Ripley*. 28 Chy. 610, p. 224.

On an application to open up proceedings by way of review on the ground of newly discovered evidence, Ferguson, J., refused the relief asked with costs on the ground amongst others, that the company, had they exercised due diligence in the matter, might have become aware of the prior purchase and payment to which such evidence related. *Dumble v. Cobourg and Peterborough R. W. Co.*, 29 Chy. 121. See also *Murray et al. v. Canada Central R. W. Co.*, 7 A. R. 646.

Held, in this case that the defendant was not debarred by laches from setting up the defence of false representation in the sale to him of certain land. See *Lee v. McMahon*, 2 O. R. 654, p. 238.

Delay in moving against by-law. See *In re Mc-Alpine v. The Corporation of the Township of Euphemia*, 45 Q. B. 199.

Motion to set aside award refused. See *Par-dee v. Lloyd*, 5 A. R. 1, p. 19.

Application to open foreclosure refused. See *Miles v. Cameron*, 9 P. R. 502.

Application for interim alimony. Delay in proceeding not satisfactorily accounted for. See *Thompson v. Thompson*, 9 P. R. 526, p. 329.

Delay in application to set aside judgment. *Lightbound v. Hill*, 9 P. R. 295, p. 395.

An infant if he wishes to avoid a contract must repudiate it within a reasonable time after coming of age, otherwise his silence will be held to amount to an affirmation of it. See *Foley v. Canada Permanent Loan and Savings Co.*, 4 O. R. 38, p. 335.

See also *Tylee v. The Queen*, 7 S. C. R. 651.

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I. OPERATION OF THE STATUTE OF FRAUDS.

The plaintiff sued defendant for damages for refusing to give him possession of premises which the plaintiff alleged that defendant had verbally agreed to give him a lease of for sixteen months:—Held, affirming the judgment of the county court, that the evidence did not shew an actual letting, but that even if it did the plaintiff must fail under the fourth section of the statute of frauds, as the action was brought in respect of an agreement for an interest in land. *Moore v. Kay*, 5 A. R. 261.

The plaintiff was the lessee of certain premises used as a factory, and having become insolvent the lease was forfeited by the lessor, the defendant, though at what particular time did not appear. The plaintiff continued in occupation, and an arrangement was entered into, whereby one F. agreed to purchase the machinery on the premises from the official assignee, giving the plaintiff the option to redeem it within two years. The plaintiff further obtained from the defendant an agreement, as follows:—"Toronto, January 27th, 1880. "In the event of Thomas Carroll continuing the occupation of building on Hayter street, I promise and agree to give a new lease at a rental of \$600 for five years; also agree to allow, &c., (specifying certain allowances). Signed, R. S. WILLIAMS." The defendant refused to sign a lease of the premises to the plaintiff, and an action being brought for specific performance:—Held, dismissing the action, that the agreement was not sufficient to satisfy the statute of frauds, as it did not appear from it with certainty when the term was to begin, nor to whom the lease was to be given. Semble, that the official assignee should have been made a party, and that in any event it would have been a case for damages, not for specific performance. *Carroll v. Williams*, 1 O. R., Chy. D. 150.

The defendant agreed to pay the plaintiff \$300 if he would procure a lease of the premises then occupied by him under lease from one W.; and adjoining the defendant's, with the privilege of making a doorway between the two houses, and assign the lease to him. At the plaintiff's request, the defendant wrote him the following letter: "To Mr. John Bland. Dear Sir,—In

reply to yours of to-day, I promise to give you \$300 provided you can give me a transfer lease, with privilege to make an opening between your premises and my own. Cash to be paid on completion of transfer lease. This is as I understand it. Yours most truly, T. EATON." The plaintiff procured a lease, and tendered an assignment of it to the defendant, who refused to accept it, whereupon the plaintiff sued for the \$300:—Held, reversing the decision of the County Court, that the defendant's letter was a sufficient memorandum to satisfy the requirements of sec. 4 of the Statute of Frauds, within which the agreement fell as being a contract concerning an interest in land; that the premises were described with sufficient certainty, and the omission to specify the terms of the lease was immaterial, they having been left in the plaintiff's discretion. The plaintiff, therefore was held entitled to recover. *Bland v. Eaton*, 6 A. R. 73.

II. CONSTRUCTION AND OPERATION OF LEASES.

1. Leases under Short Forms Act.

See *Emmett v. Quinn*, 7 A. R. 306, p. 408.

2. Covenant to Rebuild.

In a lease, expressed to be made in pursuance of the Act respecting short forms of leases, the covenants, in place of the words "the lessee covenants with the lessor," were commenced with the words "the said party of the second part covenants with the said party of the first part." Then followed covenants representing the statutory short form covenants, and a covenant to build a house on the demised premises; and another covenant to rebuild in the event of the building so erected during the term being destroyed by fire. This last covenant was introduced by the words, "and the said party of the second part further covenants with the said party of the first part." The lessee, with the assent of the lessor, assigned the lease, and the assignee built in pursuance of the covenant, and executed a mortgage to the defendant, and on the buildings being burnt down re-built them. Subsequently the defendant, on default of payment, sold, under the power in his mortgage, to one N., who assigned the leasehold interest in the property to the defendant, and thereafter the buildings, during the occupation of the defendant, were again destroyed by fire:—Held (1) that the covenant to rebuild derived no aid from the statute, and was to be read as made by the lessee for himself alone and not for his assigns, and the decree of *Blake, V. C.*, 27 Chy. 420, was reversed; *Spragge, C. J.*, *Burton*, and *Morrison, J.J. A.*, holding that the covenant being in respect of something not in esse at the making of the lease did not run with the land, and did not bind the defendant: *Patterson, J. A.*, dissenting, on the ground that the building having been erected before the assignment to the defendant, the covenant ran with the land and bound him. Held, (2) by *Spragge, C. J.*, *Burton*, and *Morrison, J.J. A.*, that the covenant to build not being one of the statutory covenants, must be read as being made by the lessee for himself alone and not for his assigns. Per *Patterson, J. A.* That the short form words introductory to the covenants should be read as if extended in the long

form upon the deed; and therefore the words "for himself, his executors, administrators, and assigns" applied to the covenant to build, though not to the covenant to rebuild. Per *Patterson, J. A.* The use of the words "party of the first," and "party of the second part," inserted in the introductory part of the covenants was a sufficient compliance with the provision of the statute, in respect to short forms of leases, which says that any name or names may be substituted for the words "lessor" and "lessee." Remarks on *Minshull v. Oakes*, 2 H. & N. 793. *Emmett v. Quinn*, 7 A. R. 306.

3. Covenant to keep up Fences.

Semble, that in this country the removal of a fence on a farm from one place to another is not per se, as a matter of law, a breach of a covenant to repair and keep fences in repair; and whether it is so or not would be a question of fact under the circumstances of each case. When the lessor accepted rent after such a removal with knowledge of it:—Held, a waiver of the forfeiture, if any, and that he could not afterwards claim to re-enter for the continuance of the fence in its altered position as a breach of the covenant. *Leighton v. Medley*, 1 O. R., Q. B. D. 207.

4. Covenant Not to Assign.

The plaintiffs, owners in fee of certain land on the 30th October, 1866, leased it for 21 years to one B by a lease under the Short Forms Act, containing covenants to pay rent and not to assign or sublet without leave. By a deed of the same date, after reciting the lease, and an agreement of B. to purchase the buildings on the land for \$1400, the plaintiffs conveyed the said buildings to B, his executors, administrators and assigns. B. then mortgaged the premises to H., and afterwards assigned his interest to C., who assigned to G. H., and G. H. assigned to M. This last assignment was objected to by the plaintiffs, who brought ejectment against the defendant D., who was in possession of the buildings under a verbal lease from B., for the forfeiture occasioned by such assignment, as also for non-payment of rent. While a rule nisi to set aside their verdict was pending the plaintiffs obtained a decree in Chancery, by which the conveyance to B., so far as it conveyed the land on which said buildings stood, was declared to be a mistake, and was rectified so as to pass only a chattel interest in said buildings, and no estate in the land:—Held, that the plaintiffs were entitled to recover for the breach of the covenant not to assign, &c., but that under the circumstances their recovery must be limited to the land alone and not to the buildings thereon, and that therefore they could not enter into said buildings or remove the defendant therefrom. *Toronto Hospital Trustees v. Denham et al.*, 31 C. P. 203.

5. Other Cases.

A verbal lease of a farm was made by a father to his son for five years, determinable by either at will, the son to have the use of the stock and implements on the farm, to pay \$100 a year and support the father and the family who lived thereon, with power to the son in his discretion

to sell and exchange the stock and implements, so long as their value was replaced. The lease was afterwards determined by the entry of the father, who took possession of the land and the goods thereon. Subsequently, an execution creditor of the son issued execution and seized the goods:—Held, Osler, J., dissenting, that the son had only a limited interest in the goods during the term: that those not parted with by the son remained just as if no power to sell had been given, while those acquired in lieu of the ones sold or by exchange became subject to the terms of the demise; at all events, on the determination of the lease by the father's entry, the original as well as the substituted goods became vested in him, as the goods were before the making of the lease; and therefore the execution creditor, under the circumstances, had no claim on the goods. Per Osler, J.—The identical articles were not necessarily to be returned, but only in the same kind and value, and therefore the transaction constituted a sale, and the property became vested in the son, and liable to be seized in an execution against him. *Oliver v. Newhouse*, 32 C. P. 90.

By a verbal agreement, entered into in June, 1876, the plaintiff leased to his son, M., who was residing with him, the farm occupied by them, for five years, at an annual rent of \$100, M. agreeing also to support the plaintiff and the other members of his family. By the terms of the agreement M. was to have the use and enjoyment of the stock and implements on the premises, estimated to be worth \$1010. It was also stipulated that M. should have power to sell or otherwise dispose of such portions of the stock and implements as he might think desirable, but at the conclusion or sooner determination of the term, he was to leave others of equal value, any surplus above that amount to be his own. Either party was to be at liberty to determine the lease at any time he thought fit to do so. In January, 1879, M. having become financially embarrassed, and finding he was losing by the farm, expressed his determination to try some other mode of life, and said that the plaintiff might have the place and the stock, &c., thereon, if he, the plaintiff, would discharge him from any claim in respect of the rent, no portion of which had been paid. M. did accordingly abandon the place, and the plaintiff thereupon assumed the management and control thereof, and took possession of the stock, &c. M. subsequently returned to his father's and continued to reside and work on the farm for his father. In March following M. executed a surrender to the plaintiff of all his right and interest in or to the farm and the crops upon it. In the month of April, for the expressed consideration of \$340, which it was alleged his father had lent him, he also executed a memorandum assigning to the plaintiff all his interest in the stock and farming implements, &c., on the place, which included, it was said, a buggy, cutter, and harness, which had been purchased by M. for his own use. In October, 1879, the defendant sued out execution against M. under which the sheriff seized the farm stock and implements, together with the said buggy, cutter, and harness. In an interpleader proceeding by the father, in which a verdict was rendered for the plaintiff, on appeal from a rule refusing to set such verdict aside:—Held, that the lease from the father to his son had the effect of vesting the chattel property in

the latter; and quare, whether it was afterwards re-vested in the father by the writings executed by M.; but as the question whether there had been a delivery and change of possession sufficient under the Bills of Sale Act had not been passed upon by the jury, and as some doubt existed in respect of the buggy, cutter, and harness, a new trial was ordered; costs to abide the result. *S. C.*, 8 A. R. 122.

See *Longhi v. Sanson*, 46 Q. B. 446, p. 412.

VI. CANCELLATION OF LEASE.

S. on the 1st August, 1868, transferred to appellants (plaintiffs), as trustees of S.'s creditors, his interest in an unexpired lease he had of a certain hotel in Montreal, known as the Bonaventure building, and in the furniture. On 1st April, 1870, A. P., the proprietor, after cancelling, with the consent of all concerned, the several leases of the said building and premises, gave a lease direct for a term of ten years to one G., at \$6,000 a year, of the building, and also of the furniture belonging to S.'s creditors, and on the same day by a notarial deed, "agreement and accord," A. P. promised and agreed to pay to appellants, as trustees of S.'s creditors, whatever he received from the tenant beyond \$5,000 a year. In February, 1873, the premises were burned, with a large proportion of the furniture, and appellants received \$3,223 for insurance on fixtures and furniture, and \$791, being the proceeds of sale of the balance of the furniture saved. The lease with G. was then cancelled, and A. P., after expending a large amount to repair the building, leased the premises to L. P. & Co. for \$6,000 a year from October, 1873. Appellants thereupon, as trustees of S.'s creditors, sued respondents representing A. P., and called upon them to render an account of the amount received from G. and L. P. & Co. above \$5,000 a year. The Superior Court at Montreal held that appellants were entitled to what A. P. had received from L. P. & Co. beyond \$5,000. On appeal to the Court of Queen's Bench (appeal side) this judgment was reversed:—Held, 1. Affirming the judgment of the Court of Queen's Bench (appeal side), that the lease to G. terminated by a force majeure, and that the obligation of A. P. to pay appellants the sum of \$1000 out of the said rent of \$6000, ceased with the said lease. That the fact of appellants having alleged themselves in their declaration to be the "duly named trustees of S.'s creditors," did not give them the right to bring the present action for S.'s creditors, the action, if any, belonging to the individual creditors of S. under Art 19. C. C. P. L. C. *Broume v. Pinsoneault*, 3 S. C. R. 102.

VII. SURRENDER OF LEASE.

See *Nixon v. Maltby*, 7 A. R. 371, p. 411.

VIII. RENT.

1. Payable by Improvements.

See *Mitchell v. Duffy*, 31 C. P. 266, p. 211; *Workman et al. v. Robb et al.*, 7 A. R. 389, p. 425.

2. Premises Burnt.

A lease of a mill, and ten acres of land adjoining, for five years at the rent of \$500 for the first year and \$550 for each of the four succeeding years, payable half-yearly in advance, contained the usual covenants and provisions amongst which was the covenant to pay rent, without any exception as to fire, and to keep in repair, accidents by fire excepted; and the lease concluded with the following clause: "Should the mill be rendered incapable by any fire, or tempest, then the portion of rent for the unexpired portion of the term paid for in advance, to be refunded by the lessor to the lessee," but there was no provision in such event for the cesser of the term:—Held, Burton, J.A., dissenting, reversing the judgment of the County Court, that the effect of the whole instrument was, that the destruction of the premises by fire, not merely gave a right to a return of a proportionate part of the current half-year's rent, but put an end to the whole term, and therefore that the lessor was not entitled to recover rent for the half year succeeding such destruction. *Agar v. Stokes*, 5 A. R. 180.

3. Eviction.

In an action to recover a year's rent on a covenant in a lease for three years, it was shewn that the defendant had harvested the crops on the farm, and that they, together with the barn and stable, were destroyed by fire before the expiration of the year, and that he was paid the insurance money; whereupon he left the farm, and the plaintiff entered, ploughed and put in a crop. The plaintiff afterwards applied on several occasions to the defendant for payment of the rent, when the defendant said he had not any money. It was shewn that a preposition had been made to leave the matter to arbitration:—Held (affirming the judgment of the judge of the County Court of Peel), that the acts of the plaintiff did not amount to an eviction, that there was not evidence to support a surrender in law, and that the plaintiff was entitled to recover. Burton and Patterson, JJ.A., dubitante. *Nixon v. Maltby*, 7 A. R. 371.

IX. COMPENSATION FOR IMPROVEMENTS.

See *Mason v. Macdonald*, 45 Q. B. 113, p. 60.

X. CROPS.

By a lease from one D. to the plaintiff it was provided that if D. sold the farm the plaintiff should give up possession upon receiving six months' notice before the 1st of April, and that he should have the privilege of harvesting and threshing the crops of the summer fallow, or the work done on said fallow should be paid for at a reasonable valuation. D. afterwards sold to the defendant, and in August the plaintiff received the stipulated notice after he had prepared the summer fallow but before he had sown it. He afterwards sowed it with fall wheat, and gave up possession on the 1st of April. Neither D. nor the defendant elected to pay for the crop, and the defendant converted it to his own use:—Held, affirming the judgment of the Queen's Bench, 44 Q. B. 509, that the true construction of the provision was, that the plaintiff was to

have the privilege of harvesting any crops which might have been put in on the summer fallow, unless D. elected to pay for them at a valuation; that he had never parted with the property in the crop, and that he was therefore entitled to recover in trover against the defendant. Per Patterson, J. A.—If the lessor intended to pay for the work, he was bound to elect to do so when he gave the notice, or at the latest, when he resumed possession. *Harrison v. Pinkney*, 6 A. R. 225.

XI. RIGHT OF TENANT TO BORE FOR OIL.

Injunction against tenant. See *Lancey v. Johnston*, 29 Chy. 67, p. 346.

XIII. ACTIONS AND PROCEEDINGS BY LANDLORD.

I. Covenant.

(a) Imperfect Execution of Lease.

The two defendants and one C., being in possession of premises as assignees of a covenant from the plaintiff for a lease, he caused a lease to the three to be drawn, which was executed by the defendants, on the representation that C. had executed a counterpart thereof, which was not the case, and the lease was never executed by him:—Held, affirming the judgment of the Common Pleas, that the evidence set out in the report, shewed that the intention of both the plaintiff and the defendants was, that C. should be a party to the lease, and that the plaintiff could not recover the rent due in an action upon the covenant in the lease. *Piper v. Simpson et al.*, 6 A. R. 175.

(b) Damages.

In an action brought to reform a lease, and claiming damages for breach of a covenant:—Held, that such claim for damages was not a "purely money demand" under sec. 4 of the Administration of Justice Act, R. S. O. c. 49. *Gowanlock v. Mans*, 9 P. R. 270.—Dalton, Master.

See *Cowling v. Dickson*, 5 A. R. 549, p. 413.

2. Overholding Tenant.

The defendant leased from the plaintiff the "refreshment room and apartments connected therewith," part of a railway station, and covenanted that no spirits of any kind should be sold or allowed to be sold in the refreshment-room, and that if he should fail, refuse, or neglect to carry out the terms of the lease, then that the lessee should, if required by the lessor, quit, leave, and absolutely vacate the premises, and the lease should terminate." The learned judge of the County Court of York found that by a sale of spirits in the bar-room, part of the demised premises, the lease had been forfeited, and ordered the issue of a writ to put the landlord in possession under the Overholding Tenant's Act, R. S. O. c. 137:—Held, affirming his decision, that the sale was a contravention of the lease that the proviso for the termination of the same extended to negative covenants; and that the lease was therefore forfeited, and a right of entry accrued to the lessor, and that it was a case coming within the Overholding Tenant's Act. *Longhi v. Sanson*, 46 Q. B. 446.

XIV. ACTION AGAINST LANDLORD.

1. For False Notice of Sale.

By a covenant in a lease of a farm from defendant to the plaintiff, it was provided that upon receiving six months notice from the lessor that he had sold the farm, and upon receiving compensation for all labour up to the date of the notice, from which he had derived no return, the lessee would deliver up possession at the end of six months, the compensation being duly paid. Defendant served the plaintiff with a notice that he had sold the farm, in consequence of which the plaintiff desisted from putting in crops, and other work for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff refused to give up possession, and sued the defendant for false representation:—Held, reversing the judgment of the Queen's Bench (45 Q. B. 94) that the plaintiff was entitled to recover the damages sustained by him in consequence of the notice. *Cowling v. Dickson*, 5 A. R. 549.

XV. TENANT'S POWER TO DISPUTE TITLE.

The plaintiff, an illiterate man, held a bond for a deed of certain land on which a balance of purchase money was unpaid, and had acquired a title to the land under the Statute of Limitations but was not aware of the effect of his possession. The defendant, who had purchased the interest of the heirs of the original owner and vendor, and his solicitor, by representing to plaintiff that he had no title, induced him to accept a lease of the land from the defendant for two years at a nominal rent, with a covenant to yield up possession at the end of the term:—Held, that, under the circumstances, the lease must be set aside; but even if allowed to stand, it would not constitute an acknowledgment sufficient to displace the plaintiff's title, for its effect would only be to create an estoppel during its continuance. *Hillock v. Sutton et al.*, 2 O. R., C. P. D. 548.

P., being the owner in fee of the land in question, died intestate in September, 1853, leaving his wife, the present plaintiff, and two daughters, who resided on the land for a short time after his death. The widow made several leases of the land, and finally leased it to M., the defendant's deviser, who, at the expiration of his lease, took a second lease with a covenant to deliver up at the end of the term. He purchased the interest of one of the daughters, and a new lease, was thereupon made to him by the plaintiff, the rent being reduced by one-third, because it was considered that the widow and daughters were each entitled to a third of the rents. Pending this lease the tenant purchased the other daughter's interest, and at the expiration of the term in 1873 he refused to give up possession, alleging that he owned the land, and that the plaintiff's right to dower was barred by lapse of time:—Held, affirming the judgment of Cameron, J., that M., the tenant, having, while owner of one undivided half of the land, covenanted to give up possession to the plaintiff at the end of the term, and having got into possession under her, the defendants claiming under M. were estopped from disputing her right, and must restore pos-

session to her before setting up an adverse title: that M., by accepting the lease at a reduction of one-third of the rent, on his purchase of the daughters' interest, had acquiesced in the plaintiff's claim as dower, and was estopped from setting up the Statute of Limitations against her, and that she was entitled therefore to judgment for one-third of the land for life, and to mesne profits since the expiration of the lease. *Patterson v. Smith*, 42 Q. B. 1, remarked upon. *Pyatt v. McKee, et al.*, 3 O. R., Q. B. D. 151.

S. being indebted to the plaintiffs, entered into an agreement to mortgage to them, amongst other lands, certain lands known as the Dominion Hotel property. A mortgage was on the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and a lot owned by S. adjacent thereto inserted. The defendant had been the tenant of S., and after the mortgage, attorned and paid some rent to the plaintiffs, believing them to have a title to the lands. In an action for arrears of rent:—Held, affirming the judgment of the County Court of York, that after such attornment and payment of rent, the defendant could not be heard to deny the plaintiff's title, and they being the equitable owners of the land, were entitled to recover. Held, also that the title not being open to question by the defendant, the County Court had jurisdiction. *Bank of Montreal v. Gilchrist*, 6 A. R. 659.

XVI. RIGHTS OF TENANTS IN RESPECT OF EXPROPRIATION OF LAND.

See *In re The Willand Canal Enlargement—Fitch v. McRae*, 29 Chy. 139, p. 113.

XVII. RIGHTS OF REVERSIONER.

Held, that any act of the tenant without the knowledge or sanction of the landlord could only affect his interest as tenant and could not prejudice the reversioner. *Dixon v. Cross*, 4 O. R., Chy. D. 465.

XVIII. MISCELLANEOUS CASES.

In replevin the defendant, who had mortgaged the demised premises to one E., claimed as landlord, under a lease alleged to have been made by him subsequent to the mortgage, three quarters' rent, which had been paid by the tenant to E.:—Held, that the evidence, set out in the report, shewed that E. was the original and actual lessor, or, at all events that previous to the payment of the rent avowed for, the tenant had attorned to E. with the defendant's consent. *McLennan v. Hannum*, 31 C. P. 210.

B. leased certain premises to Y., who assigned the lease to P., and sold to him the goods on the premises subject to a chattel mortgage to the plaintiff and others. P. gave a chattel mortgage to the plaintiff and others upon these goods to secure to them the purchase money thereof. On the 1st February the defendant took possession of the premises under a verbal agreement with P., that the latter should assign the lease to him, and it was so assigned on 4th June following.

There was no evidence as to what bargain there was between P. and the defendant as to the goods, but the goods remained on the premises without the request of the defendant. The plaintiff and his co-mortgagees subsequently took possession of the goods under their chattel mortgage; but on the same day, before they were removed, the landlord seized them for rent, a portion of which was due before defendant took possession. Upon the promise of the plaintiff to pay the rent the landlord withdrew. The plaintiff having refused to keep his promise by paying the rent, the landlord brought an action against him and compelled payment. The plaintiff now sued the defendant to recover the amount so paid:—Held, that, there being no privity of contract or estate between the defendant and the plaintiff, and the goods not having been originally placed in the premises at the tenant's request, and having in fact been in the possession of the plaintiff when seized, the defendant was not bound to protect them against seizure for rent, which he was not shewn to have been liable for: that the plaintiff's payment therefore was voluntary, so far as concerned the defendant, and he could not recover. *Herring v. Wilson*, 4 O. R., Q. B. D. 607.

Right to maintain action for injury to lateral support of building. See *McCann v. Chisholm*, 2 O. R. 506, *infra*.

LATERAL SUPPORT.

The plaintiff was entitled to the lateral support of the defendants' land, in which they made excavations for the purposes of a rink, whereby the plaintiff's land was damaged:—Held, that in substituting artificial support for the natural support of the soil which had been removed, the defendants might construct it of any material, provided it was a sufficient support for the purpose, and that they continued to maintain the plaintiff's land in its proper position. Held, also, that in estimating the plaintiff's damages, no sum should be allowed for damages to arise in future. The damages were assessed at \$40, but judgment was given for the restoration of the plaintiff's land:—Held, that the plaintiff was entitled to full costs. *Snarr v. The Granite Curling and Skating Co.*, 1 O. R., Chy. D. 102.

Held, that an action against the proprietor of adjoining land for damage done to a building by the removal of the lateral support afforded by such adjoining land, may be maintained by the tenant of the building. *McCann v. Chisholm*, 2 O. R., C. P. D. 506.

The plaintiff, tenant for years of the defendant S., sued for loss of use of a tenement in consequence of the fall of the wall thereof, which was caused by the excavation of the adjoining lot for a cellar by the defendant H. who owned it. H. had excavated his land in some places to within a few inches of the dividing line, close to which the house in question stood. This house had been built by S. in 1854, when he had a lease of the lot for ten years, which gave him the right to remove it at the expiration of the term, upon oak planks laid about one foot under the ground. In 1856, however, he acquired the fee, and in 1870, he also became owner of the lot

now owned by H., and held it for a year, when he conveyed it to E. H. from whom H. derived title. There was no evidence to shew that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in the ordinary way:—Held, that, owing to the unity of seizin of S., there had not been twenty years' continuous enjoyment of the support as an easement; but that even if there had been, no such acquiescence in the use of the servient tenement had been shewn as to justify the presumption that an easement had been acquired by grant:—Held, also, that when S. sold H.'s lot, there was no implied reservation of the right of support for the house:—Held, also, reversing the judgment of the Queen's Bench, 44 Q. B. 428, that under the circumstances there was no evidence of negligence in fact, and that the plaintiff was therefore not entitled to recover. *Backus v. Smith et al.*, 5 A. R. 341.

See also *Walker v. McMillan*, 6 S. C. R. 241, p. 97.

LAW STAMPS.

Where an examination of parties pursuant to R. S. O. c. 50, s. 161, takes place before a deputy clerk of the crown, though not designated in the order as acting in his official capacity, the fees for such examination are payable in stamps, and not in money. *Denmark v. McConaghy*, 8 P. R. 136.—Osler.

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I. OF CHATELS.

See *Oliver v. Newhouse*, 32 C. P. 90; 8 A. R. 122, pp. 409, 410.

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Power of municipality to impose a license tax on commercial travellers discriminating between resident and non-resident merchants, traders, &c. See *Jonas v. Gilbert*, 5 S. C. R. 356.

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I. WHEN IT EXISTS.

Lien of secured creditor under R. S. O. c. 107, s. 30. See *Chamberlen v. Clark et al.*, 1 O. R. 135, p. 271.

See *Troop v. Hart*, 7 S. C. R. 512.

II. MECHANICS' LIEN ACTS.

[See 47 Vict. c. 18.]

1. *On Mortgaged Property.*

A mortgagee filed a bill for sale, making certain lien-holders under the Act parties defendants therein, alleging that the work, by virtue of which their liens arose, was commenced after the registration of his mortgage:—Held, that the

lien-holders should have been made parties in the master's office; and plaintiff's costs of making them defendants by bill were disallowed on revision of taxation. *Jackson v. Hammond et al.*, 8 P. R. 157. Thom, *Taxing Officer*.

In order to preserve the lien which the Mechanics' Lien Act creates in favour of a contractor performing work on a house or other building for the owner, it is necessary to register the same during the progress of the work, and as soon as the claim arises, or it may be postponed to a mortgage created subsequently, but registered prior to such lien. *Proudfoot, V.C.*, dissenting. *Hynes v. Smith*, 27 Chy. 150; 8 P. R. 73.

The plaintiffs instituted proceedings to enforce a mechanics' lien assigned to them, which had been duly registered, and a suit thereon prosecuted. The plaintiffs claimed to be entitled to priority in respect of such lien over the claim of a mortgagee—whose mortgage was prior to the contract under which the lien arose—for the amount by which the selling value of the premises had been increased by the work and materials placed thereon. The assignee of the mortgagee demurred, on the ground that he was an owner of the land, within the meaning of the Act, R. S. O. c. 120, s. 2, and that proceedings had not been taken against him within the time specified by the Act:—Held, that he was not such an owner, not being a person upon whose request or upon the credit of whom, &c., the work had been done. *Bank of Montreal v. Haffner et al.*, 29 Chy. 319.

Where B. gave a mortgage to W., and afterwards employed G. to do certain work and furnish materials on the property mortgaged:—Held, that G. was entitled under R. S. O. c. 120, s. 7, to a lien for the amount owing for the said work and materials in priority over W.'s mortgage in respect of the increased value of the said property by reason of the said work and materials:—Held, also, that although W. had previously commenced proceedings under an alleged lien in respect of the said property against B., subsequently to the commencement of which proceedings the work was done in respect of which the present lien was now claimed, it was not necessary that G. should have been made a party to the former action, and the fact that G. was not included in the master's report in that action, as among those holding liens against the property in question, was no bar to his maintaining this one. Each lien under the Mechanics' Lien Act stands on its own footing, every lienholder being entitled to security upon the enhanced value arising by reason of his work and materials. *Bank of Montreal et al. v. Haffner et al.*, 3 O. R., Chy. D. 183.

2. *Registration of Lien.*

The plaintiffs delivered and set up for the defendant a boiler and engine, supplied by themselves, in September, 1878, upon certain terms of credit, which expired on the 25th April, 1879. Registration of the lien was effected on the 23rd December, 1878, and a bill to enforce the lien was filed on the 31st May, 1879:—Held, that the effect of the delay in the registration of the lien was, that the lien under the Act had ceased to exist, notwithstanding the plaintiffs had done

some immaterial work upon the machinery late in December, 1878; the thirty days within which the registration was to be effected being to be computed not from the time such alterations were made, or the defects in the machinery were remedied, but from the time when it was supplied and placed, i. e., in September, 1878. *Neill v. Carroll*, 28 Chy. 30. Affirmed on rehearing. *Ib.* 339.

Quære, as to the effect of the Act when the credit does not expire until after thirty days from the completion of the work, and there has been no registration of lien. *Ib.*

Where G. claimed, under the Mechanics' Lien Act, a lien in respect of materials furnished, by virtue of an assignment from the original furnisher thereof:—Held, G. had a right to register a claim for the same under the said Act, but the affidavit of verification required by sec. 4, sub-s. 2, must be made by himself, and not by the assignor. *Grant v. Dunn et al.*, 3 O. R., Chy. D. 376.

See *Hynes v. Smith*, 27 Chy. 150, p. 418; *McPherson et al. v. Gedge et al.*, 4 O. R. 246, p. 420.

3. Other Cases.

The plaintiff furnished materials to G. for a building which G. had contracted to erect for the defendants. After the defendants had paid G. all there was due to him, and after G. had abandoned his contract, the plaintiff notified the defendants of his unpaid account against G. for such materials; and filed a bill to enforce his lien more than 90 days after the materials had been furnished. A demurrer for want of equity was allowed, with costs; and—Sembles, that even if the bill had been filed in time, there would not have been any lien. *Briggs v. Lee*, 27 Chy. 464.

Remarks upon the various provisions of the Mechanics' Lien Act. *Ib.*

In a building contract for the erection of a church, the contractor agreed with the building committee to settle with all other persons doing work upon or furnishing materials for the construction thereof, and stipulated that neither he nor they should have any lien upon the building for their work or materials:—Held, binding on the sub-contractors, though made without their knowledge or assent. *Forhan v. Lalonde*, 27 Chy. 600.

It was also stipulated that 20 per cent. of the contract price should not be payable until thirty days after the architect should have accepted the work, and that the balance of the contract price so to be retained should not be payable until all sub-contractors were fully paid and settled with:—Held, (1) that no trust was thereby created in favour of the sub-contractors as to the sum agreed to be retained; and the contractor having assigned his interest in the contract to a third party, and the committee having waived their right to insist that the sub-contractors should be paid:—Held (2) that the assignee was entitled to receive 20 per cent. to the exclusion of the sub-contractors. *Ib.*

Where a contractor for the building of a house, made default in carrying on the work, and in consequence, the owner, acting under a clause in

the contract to that effect, dismissed him, and agreed verbally with a sub-contractor, who had been employed by the contractor, that if the sub-contractor would go on and finish the work, he, the owner, would pay him:—Held, that the sub-contractor was entitled to a lien for all work done under such agreement as a "contractor," and as to such work he was no longer in the position of a sub-contractor. *Petrie v. Hunter et al.*; *Guest et al. v. Hunter et al.*, 2 O. R., Chy. D. 233.

Under sec. 15 of the Mechanics' Lien Act, R. S. O. c. 120, suits brought by a lienholder shall be taken to be brought on behalf of all lienholders of the same class; and in case of the plaintiff's death, or his refusal or neglect to proceed, the suit may, by leave of the court, be prosecuted by any lienholder of the same class. *McPherson et al. v. Gedge, et al.*, 4 O. R., C. P. D. 246.

A number of unregistered lienholders brought an action under the Act to enforce their liens against one G., which proceeded to the close of the pleadings, and was then dismissed with the plaintiffs' assent. P., the assignee of a registered lienholder, relying on the action, took no steps to enforce his lien or to register a certificate within the 90 days, under sec. 21. On being informed of the dismissal of the action, he applied to be allowed to intervene as plaintiff and to prosecute the suit on his own behalf:—Held, Galt, J., dissenting, reversing the judgment of Hagarty, C. J., which affirmed the judgment of the master in chambers, that the applicant should be allowed to intervene and prosecute the action; and that the applicant was of the same class as the plaintiffs, in that they all contracted with or were employed by G. Lienholders "of the same class" are those who have contracted with the same person, whether their liens are registered or not. Per Galt, J. The applicant was not of the same class as the plaintiffs, for he was a registered lienholder and came within sec. 21, whereas they were unregistered and came within sec. 20; and the 90 days having expired the applicant's lien was gone, so that even if the plaintiffs' suit were still pending the applicant could not have become a party to it. *Ib.*

LIFE ASSURANCE.

See INSURANCE.

LIFE ESTATE.

See ESTATE.

LIGHTS.

Where a person has enjoyed an easement by having windows overlooking the lands of an adjoining proprietor for any period, even one day, over nineteen years, he cannot be deprived thereof unless he subsequently submits to an interruption of such easement for a period of twelve months. The propriety of such a rule in the towns of this province remarked upon and questioned.

The case of *Flight v. Thomas*, 11 A. & E. 688 ; 8 Cl. & F. 231, considered and followed. *Burnham v. Garvey*, 27 Chy. 80.

See 43 Vict. c. 14, s. 1.

LIMITATION OF ACTIONS AND SUITS.

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I. CLAIM TO REALTY.

1. *Operation of the Statute.*

Where a right to relief in respect of lands arises during the progress of a cause, and more than ten years are allowed to elapse before acting thereon, such right will be barred by "The Real Property Limitation Act," R. S. O. c. 108. *Ross v. Pomeroy*, 23 Chy. 435.

Operation of statute in case of lands taken by railway for right of way. See *Thompson v. The Canada Central Ry. Co.*, 3 O. R. 136.

2. *Nature and Proof of Possession.*

Where a vendor was not in possession of lands, the fact that for upwards of ten years he had paid the taxes on the property is not such a possession as is requisite to bar the right of the owner under the Statute of Limitations. *In re Jarvis v. Cook*, 29 Chy. 303.

In an action of trespass *quare clausum fregit* for the purpose of trying the title to certain land adjoining the city of Belleville, the defendants

pleaded not guilty; and 2nd, that at the time of the alleged trespass the said land was the freehold of the defendants, M. E. McC. and J. L. McC., and they justified brasking and entering the said close in their own right, and the other defendants as their servants, and by their command. The case was tried by Armour, J., without a jury, and he rendered a verdict for plaintiff with \$30 damages. The judgment was set aside by the Court of Common Pleas, and they entered a verdict for the defendants in pursuance of R. S. O., c. 50, s. 287. On appeal, the Court of Appeal for Ontario reversed this judgment, and restored the verdict as originally found by Armour, J. The defendants thereupon appealed to the Supreme Court:—Held, that the appellants (defendants), on whom the onus lay of proving their plea of *liberum tenementum*, had not proved a valid documentary title, or possession for twenty years of that actual, continuous, and visible character necessary to give them a title under the Statute of Limitations; therefore plaintiff was entitled to his verdict (*Henry, J., dissenting.*) *McConaghy v. Denmark*, 4 S. C. R. 609.

Actual occupation of land is not essential to give a right to maintain trespass by one who has the legal title. It is sufficient that he enter upon the land so as to put himself in legal possession of it:—Held, that putting up boards on the land by the owner, stating that the land was for sale, was a sufficient entry upon his part to vest the legal possession in him to enable him to maintain formally an action of trespass. *Donovan v. Herbert*, 4 O. R., C. P. D. 635.

In 1853 M., the owner of the land in question, conveyed it to P. D., who in 1859 conveyed it to L. D. Neither P. D. nor L. D. ever entered into occupation of the lot, which was a vacant one. In 1855 the defendant, who was a builder, with the knowledge and consent of P. D., used the lot for depositing his building materials on, and had continued to do so ever since, but with the like knowledge and assent of L. D. after his purchase. In 1876 L. D. fenced the lot, leaving a gate for defendant's convenience; he also planted a small portion of it, and allowed soil to be taken from it to level it. In 1877 P. D. was declared insolvent, and S., the assignee in insolvency, filed a bill in Chancery to set aside the deed of 1859 from P. D. to L. D., as having been made in fraud of creditors. In 1879 defendant contracted to purchase the lot from L. D. for \$2,400, on which he paid \$300. In 1880 a decree was obtained setting aside the deed of 1859, which was affirmed on rehearing. This was affirmed on appeal, defendant being surety for L. D. for the costs of the appeal. He had never paid any taxes on the lot. In 1880 nine feet of the lot were sold for taxes, and defendant became the purchaser; but it was redeemed:—Held, under these circumstances the defendant's possession was not such as to give him a title under the Statute of Limitations: that the plaintiff was not shewn to have been dispossessed, or to have discontinued the possession: that the agreement by defendant to purchase was evidence to preclude him from setting up a title by possession against the plaintiff, as was the fact of his having become security for L. D. in supporting his, L. D.'s, title. *Id.*

The defendant, husband of one of several tenants in common, being in possession of the joint

estate, purchased the same at sheriff's sale, of which fact the co-tenants were aware, but took no steps to impeach the transaction until after such a lapse of time as that under the statute the defendant acquired title by possession. The court, on a bill filed by the other tenants in common asking to set aside the sheriff's sale and deed on the ground of fraud and collusion between the defendant and execution creditor, negatived such charges, and dismissed the bill, with costs. Whether the sale under execution was operative or not, the defendant having held possession ever since, claiming the premises as absolute owner, the title by virtue of the statute of limitations ripened into a title in his favour. *Kennedy v. Bateman*, 27 Chy. 380.

In order to obtain convenient access to the upper rooms of their house the plaintiffs constructed a wooden platform, stairway and landing, on the outside of the house on the defendant's land. This structure was composed of planks laid upon blocks or scantling resting upon the ground, but the head of the stairs was supported upon posts which rested upon the ground. The platform and stairway were open to every one, including the defendant, and there was no bar or gate to prevent defendant from entering on his property. The defendant took no proceedings against the plaintiffs until the expiration of ten years:—Held, reversing the decree of Spragge, C., 26 Chy. 503, that the plaintiffs had not such possession of the land covered by the structure as by force of the Statute of Limitations to vest in them a title in fee simple; but that even if the statute had commenced to run it was stopped by the fact, as stated in the evidence, that during the ten years the defendant had temporarily taken up the platform, and used the land for his own purposes. It was held on the evidence that this was not shewn to have been done by the plaintiffs' permission; but *Quare*, per Patterson, J. A., whether if it had been it would not still have interrupted the operation of the statute. *Griffith et al. v. Brown*, 5 A. R. 303.

3. Possession as Against the Crown.

The Statute of Limitations was held not to be a bar to an action though brought by the crown in its capacity as trustee of the land in question in the suit. *Regina v. Williams*, 49 Q. B. 397, followed. *Attorney-General v. The Midland R. W. Co.*, 3 O. R., Chy. D. 511.

4. Right of Crown to Plead Prescription.

Held, that the Statute of Limitations is properly pleadable under sec. 7 of the Dominion Petition of Right Act, 1876. *Tylee v. The Queen*, 7 S. C. R. 651.

See also *Chevrier v. The Queen*, 4 S. C. R. 1.

5. Tenants in Common.

Where one of several tenants in common enters and dispossesses a trespasser he is, as regards his co-tenants, in possession simply as any stranger would be; and such possession does not enure to the benefit of his co-tenants. Per Cameron, J. The act of one co-tenant in so taking possession would be by virtue of his legal estate, and his so

doing would enure to the benefit of his co-tenants; thus giving a fresh starting point for the statute to begin to run against them. *Shepherdson v. McCullough*, 46 Q. B. 573, p. 432, remarked, upon and as applied to the facts of this case, approved. *Harris v. Mudie*, 7 A. R. 414; 30 C. P. 484.

6. Tenants at Will.

An entry upon land under assertion of right, and verbal submission by the occupant, and consent to remain as tenant to the owner, create a new tenancy at will, and give a fresh point of departure under the Statute of Limitations. Where the attention of the jury had not been sufficiently called to the question whether this took place on the premises, a new trial was granted. *Smith v. Keown, et al.*, 46 Q. B. 163.

John C., being owner in fee of the land in question, sometime after 1854 placed his brother James C. in possession, rent free. In 1867 defendant, having married a daughter of James C., went to live with the latter and occupied part of the house, at the instance of John C., who wished his niece to remain in the house and take care of her infirm mother. John C. died 2nd September, 1874, having devised the land to the plaintiff. James C. died in 1873 or 1874, and his wife about a year later, and the defendant and wife continued in possession. In 1875 one G. went to the house with the plaintiff's husband, with the view of renting it, when defendant shewed them over the house, and said if it was going to be rented he would rent it himself and pay as much for it as any one, and he spoke of buying it. The plaintiff having brought this ejectment in March, 1879, :—Held, that plaintiff was entitled to recover as against defendant. Per Hagarty, C.J.—The defendant was never tenant to John C. during the lifetime of James C. and his widow; and the statute did not begin to run in his favour till a year after the death of the latter. Per Armour, J.—The entry of the defendant in 1867 by John C.'s authority determined the tenancy at will of James C., theretofore existing, and a new tenancy at will by defendant and James C. thereupon began, which was determined by the death of James C.'s widow, when defendant became tenant at sufferance to the plaintiff, and her entry, by her husband, with G., acquiesced in by the defendant, was a sufficient entry to create a new tenancy at will and stop the running of the statute. *Cooper v. Hamilton*, 45 Q. B. 502.

Whenever a new tenancy at will is created, this forms a fresh starting point for the running of the Statute of Limitations. Therefore where A. was let into possession of certain lands as tenant at will to B., in 1870, and B. died in 1878, having devised the lands to trustees in trust for A, for life, and then in trust for C., which devise A. in no way refused, but continued in possession ostensibly as before, and now claimed title by length of possession against the said trustees and C.:—Held, that A. must be presumed to have accepted the devise, and his retention of possession must be attributed to his rightful title under the devise; and therefore even if A. could be considered as tenant at will to his trustees, and capable of acquiring title by possession as against them and C., which under R. S. O. c. 108, s. 5,

sub-ss. 7, 8, he could not, yet on the death of B. a new tenancy at will was created, and a new period commenced for the running of the statute, which had not at the time of action brought, continued long enough to give the plaintiff title by possession. *Re Defoe*, 2 O. R., Chy. D. 623.

R., in 1867, permitted the defendant L. to occupy certain lands upon an alleged agreement that in lieu of rent he should make improvements such as were required for L.'s trade, but not defined as to extent or value, of which R. would obtain the benefit, and that L. would give up possession whenever R. required it—there being no agreement for any term. R., between 1867 and 1879, went occasionally on the place and spoke with L. about the improvements, telling him to make such improvements as he chose. In 1879, after L. had become financially involved, he restored the possession of the premises to R.:—Held (Burton, J. A., dissenting), that L. could not have set up a title under the Statute of Limitations; nor could the plaintiffs, his creditors, claim the land as having been so acquired by him. Per Spragge, C.J., and Osler, J.—The entries of R. in going upon the land, were sufficient to prevent the statute from running: and per Spragge, C.J., R. might be said to have been in receipt of the "profits" of the land, through its increase in value by reason of the improvements. Per Patterson, J. A.—The evidence shewed that by the successive improvements made as they were, the relation of landlord and tenant was continued or created anew, even though the improvements to be made were not strictly in lieu of rent, nor could be treated as profits of the land. Per Burton, J. A.—L. upon the evidence entered as tenant at will; there was no receipt of "profits" within the meaning of the statute; and no entry inconsistent with the lessee's title; and L. having acquired a title by possession the land was liable for his debts. If L. had acquired a title under the statute, his giving up possession again to R. would not reverse the estate. *Workman et al. v. Robb et al.*, 7 A. R. 389; 28 Chy. 243.

See *Ryan v. Ryan*, 5 S. C. R. 387, p. 429.

7. Mortgagor and Mortgagee.

The plaintiffs, the administrator and heirs-at-law of a mortgagee, filed their bill against the mortgagor on or before the 20th October, 1864. After service, and on 15th November, 1864, an agreement was entered into between the parties, whereby the plaintiffs took notes for the mortgage money, the 1st payable 1st June, 1866, and the others in the six following years, whereupon proceedings on the mortgage were suspended. The defendant made a payment in June, 1867, and died in 1869. The notes were not paid. The suit on 29th August, 1879, was revived against the infant heir of the mortgagor:—Held, that the claim was barred by R.S.O. c. 108, s. 23; but in case of the plaintiffs desiring to obtain the fruits of a judgment recovered against the original defendant, the bill was retained for a year as against the infant defendant, as he would be a proper party in a proceeding against the personal representative of his ancestor to enforce the judgment. *Ross v. Pomeroy*, 28 Chy. 435.

The possession of a stranger which has not ripened into a title as against the owner of land,

will not enure to the benefit of him so in possession as against the mortgagee, so long as his interest is regularly paid by the owner. *Chamberlain v. Clark*, 28 Chy. 454.

When the right of action for entry or foreclosure is taken away by virtue of R. S. O. c. 108, s. 15, the title itself of the mortgagee is extinguished, and the right of action wholly disappears. *Court v. Walsh*, 1 O. R., Chy. D. 167.

A mortgagee who has suffered the statute to run before he asserts his right of entry cannot, by afterwards getting possession of the property, revive his title to it, but he is in as a mere trespasser. *Id.*

The insolvency of the mortgagor and the appointment of an assignee in insolvency, does not suspend the running of the Statute of Limitations, so as to preserve the lien and security of the mortgagee on the land mortgaged. *Id.*

The remedy by way of foreclosure or sale in mortgage suits is a proceeding to recover lands within the meaning of R. S. O. c. 108, s. 4. Therefore when a suit to foreclose a mortgage was commenced ten years and eight months after the date of the default in payment, and the plaintiff claimed payment of the mortgage debt, possession and foreclosure:—Held, that the only relief to which the plaintiff was entitled, was judgment upon the covenant for payment. *Fletcher v. Rodden*, 1 O. R., Chy. D. 155.

Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees, "their heirs and assigns forever, all and singular," the mortgaged land, habendum "as and for all the estate and interest" of the grantors "in and to the same":—Held, sufficient to pass the fee to the grantees:—Held, also, the benefit of the possession held by the mortgagees, without any written acknowledgment of the title of the mortgagor, passed by the above deed to the grantees, and coupled with their own subsequent possession for the necessary period conferred on them an absolute title to the land by virtue of R.S.O. c. 108, ss. 15, 19. *Bright v. McMurray*, 1 O. R., Chy. D. 172.

C., being the locatee of the Crown, in 1860, mortgaged the north-half and the south-half of the land by two mortgages to McM. In 1865 he died. In 1870 and 1874, McM. assigned the mortgages respectively to D. In 1875 the patent of the north-half issued to one Campbell, who paid the purchase money due to the Crown on the whole lot, at the request of M. and A., the widow and son of C., and the patents of the east and west halves of the south-half, issued to M. and A. respectively, without any intention (as shewn by the memorandum in the Crown Lands Department) to cut out the right, if any, of D. under his mortgage. In 1876, D., under the power in his mortgages, sold to L., who, in 1876, made a mortgage to the plaintiff, on which this suit was brought. M. and A. had, in the meantime, always occupied the land without paying principal or interest, and they claimed title by possession:—Held, affirming the judgment of the Court of Chancery, 27 Chy. 253, that M. and A. had, under the Statute of Limitations, acquired a title by possession. *Watson v. Lindsay et al.*, 6 A. R. 609.

H., being seised of land subject to a mortgage to L., dated 14th October, 1863, and to one M., dated 12th January, 1864, made an assignment to W. on 22nd November, 1866, under the Insolvent Act of 1864. On 28th January, 1868, he obtained his discharge. On 27th January, 1869, he obtained from M. an assignment of M's mortgage; and on 3rd May, 1869, he made a conveyance under the power of sale in this mortgage to F. H. to the use of his, the grantor's wife, his co-defendant, the consideration mentioned being \$250, which was credited on the mortgage. On 12th April, 1869, L. assigned his mortgage to M. & B., who, on 28th March, 1873, assigned it to W. In 1879 H., having procured assignments to himself of most of the claims against his insolvent estate, presented a petition signed by himself to compel W. to wind it up. He alleged that M. & B. held the L. mortgage in trust for the estate, and asked to have the estate realized and distributed among the creditors. A sale was accordingly had on 20th April, 1880, of all the right, title, and interest of the insolvent in the land; and the advertisement further stated that the purchaser would acquire only such title as the vendor had as assignee. H. attended at the sale, and objected to the sale of the land, and bid for the same; but the plaintiff became the purchaser, and took a conveyance from W. on 4th February, 1881. Most of the purchase money went to H. as assignee, for the claims against his estate. H. and his wife had remained in undisturbed possession since his discharge in insolvency.—Held, reversing the decision of Osler, J., that upon the evidence, set out in the report of the case, the possession of H. and his wife must be considered to have been the possession of H.; that the title of the first mortgagee was not extinguished, and that defendants were estopped by their conduct from disputing the plaintiff's title. *Miller v. Hamlin et ux*, 2 O. R., Q. B. D. 103.

The equity of redemption is an entire whole, and so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures for the benefit of all, and the mortgagee must submit to redemption as to the whole mortgage. Hence, in a redemption suit, where the mortgagor died intestate in 1858, leaving children, the plaintiffs therein, some of whom, if alone, would have been barred as to redemption by R. S. O. c. 108, ss. 19, 20.—Held, since some of the children had not been adult for five years preceding the filing of the bill, none of the plaintiffs were barred by the statute. R. S. O. c. 108, s. 43 applies to mortgage cases as well as other cases. *Hall v. Caldwell*, 8 U. C. L. J. 93 followed. *Forster v. Patterson*, L. R. 17 Ch. D. 132, and *Kinsman v. Rouse*, L. R. 17 Ch. D. 104 not followed. *Faulds v. Harper, et al*, 2 O. R., Chy. D. 405. Reversed on appeal. See 20 C. L. J. 145.

See *Hooker v. Morrison*, 28 Chy. 369, p. 433; *Slater v. Mosgrove*, 29 Chy. 392, p. 436; *Miller v. Brown*, 3 O. R. 210, p. 434.

8. Possession as against Equitable Tenant.

Held, (affirming the judgment of Spragge, C., 28 Chy. 221.) upon the facts there stated, that the tenant of an equitable tenant for life, in setting up the Statute of Limitations against the

equitable remainderman, could not be allowed to compute the time during which he had been in possession prior to the death of the tenant for life. Per Burton, J. A.—The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is still bound to sue in the name of the trustee. The provisions of the Statute of Limitations as regards equitable estates considered. Per Patterson, J. A.—Under the circumstances appearing in this case the plaintiff was entitled to recover in respect of the equitable estate. *Adamson v. Adamson*, 7 A. R. 592.

9. Servant or Caretaker.

B. entered into possession of a small portion of a lot of land which he had fenced and cultivated, the lot being in a state of nature, and upon the agent of the owner discovering B. to be so in possession suffered B. to remain there, he agreeing to look after the property in order to protect the timber; and B. subsequently assumed to sell the whole to one J., his grandson. On a bill filed by the owner, the court (Spragge, C.), held that under the circumstances the Statute of Limitations did not run in favour of B. so as to give him a title by possession, and that J. was not entitled to the benefit of the defence of "purchase for value without notice," he having omitted to allege that B. was seized; that J. believed he was seized; that B. was in possession, and that the consideration for the transfer by B. to himself had been paid. Subsequently, and in 1878, the plaintiff's agent again visited the property, and obtained B.'s signature to a memorandum agreeing to hold possession and look after the property for the plaintiff.—Held, a sufficient recognition of the title of the plaintiff, and that the defendants could not put him to proof thereof. *Greenshields v. Bradford*, 28 Chy. 299.

The plaintiff's father, who lived in the township of T., owned a block of 400 acres of land, consisting respectively of lots 1 in the 13th and 14th concessions of the township of W. The father had allowed the plaintiff to occupy 100 acres of the 400 acres, and he was to look after the whole and to pay the taxes upon them, to take what timber he required for his own use, or to help him to pay the taxes, but not to give any timber to any one else, or allow any one else to take it. He settled in 1849 upon the south half of lot 1 in the 13th concession. Having got a deed for the same in November, 1864, he sold these 100 acres to one M. K. In December following he moved to the north half of this lot No. 1, and he remained there ever since. The father died in January, 1877, devising the north half of the north half, the land in dispute, to the defendant, and the south half of the north half to the plaintiff. The defendant, claiming the north 50 acres of the lot by the father's will, entered upon it, whereupon the plaintiff brought trespass, claiming title thereto by possession. The learned judge at the trial found that the plaintiff entered into possession and so continued, merely as his father's caretaker and agent, and he entered a verdict for the defendant. There was evidence that within the last seven years, before the trial, the defendant as agent for the father was sent up to remove plaintiff off the

land, because he had allowed timber to be taken off the land, and that plaintiff undertook to cut no more and to pay the taxes and to give up possession whenever required to do so by his father:—Held, reversing the judgment of the Court of Appeal for Ontario, (4 A. R. 563,) which had reversed that of the Court of Common Pleas (29 C. P. 449,) that the evidence established the creation of a new tenancy at will within ten years. Per Gwynne, J. That there was also abundant evidence from which the judge at the trial might fairly conclude as he did, that the relationship of servant, agent, or caretaker, in virtue of which the respondent first acquired the possession, continued throughout. *Ryan v. Ryan*, 5 S.C.R. 387.

10. Possession By or Against Infants.

Where a person enters upon the lands of infants, not being a father or guardian, or standing in any fiduciary relation to the owner, and remains in possession for the statutable period, the rights of the infants will be barred. *Quinton v. Frith*, Ir. R. 2 Eq. 415, considered and not followed. *In re Taylor*, 28 Chy. 640, reversing S. C., 8 P. R. 207.

Trustees, under a will executed by a woman who afterwards married, received on behalf of an infant devisee the rent of certain lands from the tenant. When the infant came of age the tenant paid the rent to her. Subsequently and after more than ten years had expired, since the trustees first received the rent, the heir-at-law of the testatrix claimed the land, on the grounds that the will was revoked by the subsequent inter-marriage of the testatrix and that the Statute of Limitations did not run for or against an infant:—Held (without deciding as to the revocation of the will), that the possession of the trustees was the possession of the infant, and she thus acquired a good statutory title to the land. *Re Goff*, 8 P. R. 92.—*Stephens, Referee*.—*Proudfoot*.

See *Hughes v. Hughes et al*, 6 A.R. 373, p. 436.

11. Adverse Possession.

The testator by his will, executed in 1840, gave the annual income of all his real estate to his wife, for the support of herself and children during widowhood; and after her death or marriage, and the youngest child attaining majority, the property was to be divided. He appointed his widow and eldest son executrix and executor, both of whom continued to reside, with the other members of the family, in the homestead, and she, with the consent of her son, received the rents of the realty, which she applied in the support of the children for more than twenty years after the death of the testator, without having had dower assigned to her, or having made any demand therefor. Some of the lands had been acquired by the testator after the execution of the will, and as to them there was an intestacy. A bill having been filed by one of the heirs, seeking an account of rents received by the widow, and a partition of descended lands:—Held, on rehearing (in this affirming the order of *Proudfoot*, V. C. 25 Chy. 293) that the widow was not bound to elect between the provision made for her by the will and her dower, and that notwithstanding the lapse of time she was entitled, out

of the devised lands, to retain one-third of the rents in respect of past and future dower; but that, as to the descended lands, the remedy was barred by the Statute of Limitations; that the claim made by the widow in her answer, and awarded her by the decree, was a pursuing the remedy so as to bring the case within the statute, although as to the rents of these lands received, the widow was entitled to set off against the claim made by the plaintiff, the amount which she was entitled to have received thereout as dower. (*Proudfoot*, V. C., dissenting, who considered the widow entitled to the same relief in respect of these as of the lands devised.) *Laidlaw v. Jackes*, 27 Chy. 101.

C. R. died intestate in 1864, seized in fee simple of the land in question, leaving his widow and several heirs-at-law. The widow remained in possession from the time of his death until her own decease in 1881, and cultivated the farm. There was some evidence of her declarations that she kept possession with the consent of the heirs for them, claiming only her dower, but no evidence of a written acknowledgment of their title. She devised the land to the plaintiff:—Held, that the possession of the widow was not a possession qua dower even of one-third of the land, and that the title of the heirs-at-law to the whole had been thereby barred. *Johnston v. Oliver et al*, 3 O. R., Q. B. D. 26.

12. Exclusive Possession.

In 1851 the defendant's father bought for defendant the land in question, and in pursuance of his instructions, to prevent the defendant disposing of the land, the deed, which was registered, was made to defendant's son W., then about twelve years old. The defendant and his family thereupon took possession, and lived there up to the present time, the defendant being assessed and paying the taxes. The family residence, with the garden and orchard, which was fenced off from the rest of the land, and comprised from two to four acres, was always deemed to be the defendant's special property, and he had always exclusive possession thereof, with the consent of the others. W. resided with his father for several years, and then went to the United States, but returned in 1869, when he conveyed by deed in fee simple, which was registered, to one H., his step-brother, who had full knowledge of all the facts and circumstances, and who had been working the land on shares with the defendant and another. Defendant complained to him of the sale, and denied W.'s right to sell, whereupon it was arranged that things were to go on as before, and defendant was to have his share. H., in 1870, and again in 1874, without the defendant's knowledge, mortgaged the land, by mortgages duly registered, to the plaintiffs, who had no notice or knowledge of any of the circumstances, or of the defendant's possession. In February, 1881, ejectment was brought by the plaintiffs:—Held, that the plaintiffs, being purchasers for value without notice, claiming under the registered paper title, were under R. S. O. c. 111, s. 81, entitled to recover, except as to the house and plot, to which the defendant by his exclusive possession had acquired a title under the Statute of Limitations. *The Canada Permanent Loan and Savings Company v. McKay*, 32 C. P. 51.

13. Actual and Constructive Possession.

In ejectment it appeared that the lot in question had been granted in 1812, with other lots, to M. A. P., M., and P. In order to prove the alleged conveyance of the 13th February, 1816, by M. C. to W., which had been lost, the plaintiff put in a memorial thereof, registered 19th December, 1826, signed by the grantee, including an undivided moiety in all the land in the patent with other lands. It was shewn also that W., in 1827, had mortgaged all the lands in this memorial with other lands, to a bank, which, in 1829, reconveyed them to the trustees under W.'s will, that in 1833 R. took a conveyance from the devisee of W. of three of the lots mentioned in the memorial, not including the lot in question; and that in 1834, proceedings were taken in partition on the petition of the devisee of W., under which this lot was assigned to W. Possession had been held of this lot, not in accordance with the alleged lost deed, but by persons claiming under R.; but the court held that the evidence failed to prove such possession for forty years, or that it was taken with the knowledge of W. or his devisee. The plaintiff claimed under a deed from such devisee executed in 1873:—Held, Cameron, J., dissenting, 1. That there was sufficient proof of the lost deed from M. C. 2. That the plaintiffs claiming under W. were protected under C. S. U. C. c. 88, s. 3, as against the possession of R., his co-tenant, for less than forty years. *Van Velsor et al. v. Hughson*, 45 Q. B. 252. Affirmed, see 20 C. L. J. 11.

Thirty or forty years before action a blazed line had been run between the lots of plaintiff and defendant by S., a surveyor, along part of which a fence had been erected. The parties respectively cut timber and exercised acts of ownership on the lands on each side of and up to the blazed line. The plaintiff swore that although he and his father had been governed by this line and never claimed or went beyond it, it was always their intention to dispute it when they should be able to establish the true line. The learned judge at the trial found that there was sufficient evidence of defendant's occupation of the land up to the blazed line to extinguish the plaintiff's title:—Held, Armour, J., dissenting, that the verdict was right. *Steers v. Shaw et al.*, 1 O. R., Q. B. D. 26.

Title by possession to wild land can be made out otherwise than by actual enclosure. *Ib.*

The judgment of the court of common pleas (30 C. P. 484) affirmed as regards the right of the defendant under the statute of limitations to that portion of the land of which actual possession had been shewn for forty years; but varied by entering judgment for the plaintiff for the rest of the land sued for. The doctrine of constructive possession has no application in the case of a mere trespasser having no colour of title, and he acquires title under the statute of limitations only to such land as he has had actual and visible possession of, by fencing or cultivating, for the requisite period. (Cameron, J., dissenting.) *Harris v. Mudie*, 7 A. R. 414.

14. Mistaken Boundaries.

The plaintiff owned the east three-quarters and the defendant the west quarter of lot 25, in the

11th concession of Enphrasia. Sixteen years before suit, L., a surveyor, was employed by both plaintiff and defendant to ascertain the true division line between their lands. The parties cleared up to the line run by L. on each side of it, and a fence was gradually built along the line as the clearing proceeded, but did not extend through the lot, and had not all existed for more than ten years. The plaintiff had notified defendant that, if any of his timber fell into the plaintiff's clearing, the defendant must remove it. Two years before suit another survey was made, at the plaintiff's instance, throwing the division line two chains ten links farther west than L.'s line. On this line the plaintiff erected a fence which the defendant took down, and the plaintiff brought trespass:—Held, Armour, J., dissenting, that there was ample evidence of the defendant's possession of the land bounded by the line run by L., so as to entitle him to claim according to that line produced from front to rear of the lot, and a verdict in his favour was upheld:—Per Armour, J., adjoining proprietors cannot be bound by a line run between them, which is not the true line, except by such a contract as a court of equity would decree specific performance of: here there was no evidence of any contract or intention to abide by L.'s line, whether it was a true line or not; and in such a case the statute will give a title only to such land as has been substantially enclosed for the whole of the statutory period. Per Hagarty, C. J., that apart from the statute, the evidence did not shew with sufficient clearness, as a matter of survey, that defendant had trespassed on his land. *Shepherdson v. McCullough*, 46 Q. B., 573.

See *Steers v. Shaw et al.*, 1 O. R. 26, p. 431.

15. Entry or Claim.

Where the true owner of land in exercise of his right enters upon any portion of the land which is not in the actual possession of another the entry is deemed to refer to the whole lands. *The Great Western R. W. Co. v. Lutz*, 32 C. P. 166.

See *Donovan v. Herbert*, 4 O. R. 635, p. 422.

16. Discontinuance.

On 8th April, 1854, the plaintiff acquired by conveyance the fee simple of a vacant piece of land, but did not enter. Shortly after a railway company surveyed and staked out a portion of it, with other land required for their railway, and the sum so be paid by them to the plaintiff was settled by arbitration under the statute, but the company never paid or took possession. On 31st December, 1857, the plaintiff recovered judgment against the railway company, and under proceedings in Chancery sold their interest in the land to the defendant P., who did not take actual possession, though he went upon the land prior to 1860, and examined the clay to see whether it was fit for brick making. He did not fence or cultivate it, though it was fenced on two sides by the adjoining proprietors. He also put up a board on it with an advertisement that the lot was for sale, signed by him, but when was not shewn, and it was knocked down and not replaced. In 1876 P. sold the land to the defendant company, who immediately went into possession.

and made valuable improvements. The railway company and the defendants paid the taxes from 1853. Held, (Cameron, J., dissenting), that neither the railway company nor P. had such a possession of the land as extinguished the title of the plaintiff, who was therefore entitled to recover the land. Per Cameron, J.—There had been a discontinuance by the plaintiff, and sufficient evidence of an adverse claim to defeat the plaintiff's title. *Walton v. The Woodstock Gas Co., et al*, 1 O. R., Q. B. D. 630.

See *Griffith et al v. Brown*, 5 A. R. 303, p. 423.

17. Acknowledgment of Title.

The father of the defendant was in wrongful possession of land from 1844 to 1862, when P. the owner mortgaged to A., who assigned to the plaintiff, and interest was regularly paid thereon by the mortgagor until two years before the institution of this suit. In 1865 the defendant wrote to P. concerning a purchase of some timber on the lands, and P.'s agent went over and measured the timber cut, which was sold to the defendant; and in 1866 P. sold timber on the land to strangers:—Held, (1) that such entries upon the land, which were sufficient to constitute trespass if unlawful, interrupted the running of the statute in favour of the defendant, who was tenant at will; and that the written application of the defendant to P. was a sufficient acknowledgment of title to prevent the running of the statute as against P., and (2) that the possession of the defendant before the creation of the mortgage which was insufficient at that time to bar the mortgagor, did not run against the plaintiff. *Hooker v. Morrison*, 28 Chy. 369.

An acknowledgment of title by a person in possession of land, given to a mortgagor, is sufficient to prevent the occupant acquiring title under the statute, so as to bar the rights of the persons entitled. For this purpose it is not necessary that the mortgagor should be acting as agent of the mortgagee; the mortgagor for such purpose is a person entitled under the statute. *Id.*

A., in 1835, went into possession of land upon the invitation of P., who promised to give him a deed, but subsequently refused to do so. A. thereupon determined to remain upon, and succeeded in making a living from the land. P. died three years afterwards, having devised the land to A. and his wife for their joint lives, with remainder to J., one of the contestants. A. occupied the land until 1877, when he executed a conveyance thereof in fee to the petitioner:—Held, on appeal, affirming the decision of the referee of titles allowing the claim of the contestants, that A. by his entry had become tenant at sufferance to P., and that as A. was aware of the devise to himself, and never did any act shewing a determination not to take the estate so given to him, the estate for life had vested in him, and that he or his grantee could not claim the fee by virtue of A.'s possession. Some thirty years after A.'s entry he granted part of the land to one B., and J. joined in the conveyance:—Held, a sufficient admission of the title of J. as a remainderman, and so an admission that the will was operative on the land; J. having no claim to the land otherwise than under the will. *Re Dunham*, 29 Chy. 258.

Where a mortgagee in possession wrote, in 1871, to the holder of the equity of redemption as follows: "The amount due me in November, 1853, on your mortgages was as follows," (stating the amounts.) "No part of that sum has since been paid to me, but the rents I have received have nearly kept down the interest":—Held, a sufficient acknowledgment of title to give a new starting point to the statute from the date of the letter. *Miller v. Brown*, 3 O. R., Chy. D. 210.

See *Greenshields v. Bradford*, 28 Chy. 299, p. 428.

18. Other Cases.

The widow and heir joined in creating a term in the descended lands for ten years and in the lease it was stated that it had been mutually agreed between the parties thereto that one-third of the rent should be paid to the widow in each year which was accordingly done during the currency of the term:—Held that this had the effect of preventing the lapse of time being set up as a bar under the statute to the widow's right of dower. *Fraser v. Gunn*, 27 Chy. 63.

Although according to the ruling in *Adamson v. Adamson*, 25 Chy. 550, a plaintiff will not be allowed to amend so as to set up a title acquired after the filing of the bill, yet where by error in the conveyance the west instead of the east half of the lot was conveyed, it would seem (per Proudford, V.C.) that it would not be any infringement of that rule to allow an amendment setting up the fact that since the filing of the bill the error had been corrected by a new conveyance, and making the necessary amendments in the bill in accordance therewith. But the bill having been amended in one part of it in this respect, leaving the erroneous description of the land in the earlier part of it, the Court on rehearing held that the suit had not been instituted with regard to the east half so as to prevent the defence of the Statute of Limitations being set up, and affirmed the decree of Blake, V. C., 25 Chy. 552. *Dumble v. Larush*, 27 Chy. 187.

Sometime before 1863 the defendant M. at the solicitation of his father and mother went into possession of 300 acres of land, 100 acres of which were the estate of the mother, and cultivated the same relying on the promise and agreement of his parents to give him a conveyance. In 1866 the mother died without having executed any deed of her 100 acres, and in October of that year the father, in the belief that he was heir to his wife, executed a conveyance to M. of the whole 300 acres, and which M. executed as grantee. The father died in 1873, and M. continued to reside on the property with the knowledge of his several brothers and sisters until 1877, when, owing to an objection raised by a railway company who desired to obtain a deed of a portion of the 100 acres, it was discovered that the deed of 1866 had not effectually conveyed that portion belonging to the mother, and thereupon the defendant obtained a deed of quit claim from the several heirs. In 1878 a bill was filed by the heirs impeaching this deed as having been obtained by fraud, and the Court being satisfied that the same had been obtained improperly set it aside with costs; but ordered M. to be allowed for his improvements, as having been made under a bona fide mistake of title, he accounting for rents and profits since the death of the father;

and :—Held, that under the circumstances M. could not avail himself of the Statute of Limitations, as up to the death of his father in 1873, he was rightfully in possession under the deed from the father which stopped the running of the statute against the heirs of the mother and which, though void as a deed in fee, was effectual to convey the father's interest as tenant by the curtesy. *McGregor v. McGregor*, 27 Chy. 470.

The defendant, in consideration that his father would convey to him certain lands in the township of Caledon, undertook and agreed to convey to the plaintiff, a younger brother, 100 acres of land in the township of Artemesia. The father conveyed the land to the defendant, but instead of his conveying to the brother as he had agreed, he sold the property more than twelve years before bill filed, the plaintiff being then at least twenty-one years of age :—Held, that under these circumstances the defendant was merely a constructive trustee, and that the plaintiff's right to call for a conveyance was barred by the Statute of Limitations; but the defendant having denied the agreement to convey, which, however, was clearly established by his own evidence, the Court (Blake, V.C.) on dismissing the bill, refused to give defendant his costs. *Ferguson v. Ferguson*, 28 Chy. 380.

The plaintiff being the owner of a tract of land near Prescott, on the 29th of October, 1849, agreed with the contractors engaged in the laying out of the railway of the defendants, and in acquiring lands and rights of way for the construction thereof, in consideration of their placing the station of the railway for Prescott upon his land, to convey to the contractors, their heirs, &c., six acres of such land for that purpose, and, if necessary, for the purposes of such station, to allow them to take an additional quantity, not exceeding in all ten acres. The station was erected in 1855 on these lands, and used by the company until 1864, when it was closed, and a station erected about one-and-a-half miles from the plaintiff's lands, and station buildings erected thereon, in consequence of which the plaintiff's remaining lands became depreciated in value :—Held, that the defendants having entered upon and retained possession of the lands, so agreed to be conveyed, for more than twenty years before the filing of the present bill, (1876) afforded no defence under the Statute of Limitations, as up to a period much within the twenty years their possession could not be questioned, and no right of suit had accrued to the plaintiff until the use of the lands for the purposes of the station was discontinued in 1864. *Jessup v. Grand Trunk R. W. Co.*, 28 Chy. 583. Reversed on appeal, 7 A. R. 128.

Hugh O'Hare purchased the land in question, and took a deed dated 30th April, 1870. His brother James, the defendant, paid a small portion of the money, and immediately went into possession. Hugh occasionally visited the place. On the 30th November, 1874, Hugh mortgaged to the plaintiff, who issued his writ on the 25th February, 1881. Defendant claimed title by possession :—Held, that in any event the statute would not commence to run in defendant's favour until a year from his entry, and that he therefore had acquired no title. *Grant v. O'Hare*, 46 Q. B. 277.

A promissory note made by the purchaser, and endorsed by his son, was given as security for the payment of land sold to the defendant, on which note a payment had been made by the endorser :—Held, that such payment was properly applicable to reduce the amount remaining due upon the purchase money, and was sufficient to prevent the running of the statute. *Slater v. McGroove*, 29 Chy. 392.

The plaintiff filed his bill against his two brothers seeking administration of his father's estate, of which he alleged they had possessed themselves on his death in 1848. It appeared that the plaintiff attained his majority in 1857, and it was not proved that any fraud or concealment had been practised upon him :—Held, that the plaintiff was barred by the Statute of Limitations, and by the releases executed by him. *Hughes v. Hughes et al.*, 6 A. R. 373.

A testator devised land subject to a lease, to J. H. in fee, and as to the rent directed half to be paid to J. H., and half to the executor in trust for J. H. The executor, assuming the devise to be valid, paid all the rent to J. H. The latter executed a deed of the land to C. H., to whom he afterwards paid the rent with the privity of the executor, as soon as he received it from him. C. H. went into possession of the land after the expiration of the lease, and had been so receiving rent or in possession for more than ten years before action commenced. J. H. was a witness to the will :—Held, affirming the decision of Proudfoot, J., that the devise of rent was void under 25 Geo. II. c. 6, s. 1, as J. H. was the beneficial devisee of the whole of it. Rent issuing out of land is a tenement; it partakes of the nature of land, and is within the 5th section of the Statute of Frauds, and hence is also within 25 Geo. II. c. 6, s. 1. Held, further, (also affirming Proudfoot, J.) that the perception of the rent by the executor was for the outset "wrongful" within R. S. O. c. 108, s. 5, sub-s. 5, and C. H. had acquired a good title by possession. *Hopkins v. Hopkins et al.*, 3 O. R., Chy. D. 273.

The Statute of Limitations does not begin to run against a tax purchaser until the period of redemption has expired. *Smith v. The Midland R. W. Co.*, 4 O. R., Chy. D. 494.

II. CLAIM TO EASEMENTS.

Held, Armour, J., dissenting, that the Ontario Act (R. S. O., c. 108,) reducing the period of limitation to ten years, does not apply to the interruption of an easement, such as a right to a way in alieno solo, in this case a lane, which the defendant had occupied and obstructed for ten years, but which the plaintiff had used prior to such obstruction. *Mykel v. Doyle*, 45 Q. B. 65.

Where a person has enjoyed an easement by having windows overlooking the lands of an adjoining proprietor for any period, even one day, over nineteen years, he cannot be deprived thereof unless he subsequently submits to an interruption of such easement for a period of twelve months. The propriety of such a rule in the towns of this province remarked upon and questioned. The case of *Flight v. Thomas*, 11 A. & E. 688; 8 Cl. & F. 231, commented on and followed. *Burnham v. Garvey*, 27 Chy. 80. But see 43 Vict. c. 14, s. 1.

The plaintiff, tenant for years of the defendant S., sued for loss of use of a tenement in consequence of the fall of the wall thereof, which was caused by the excavation of the adjoining lot for a cellar by the defendant H. who owned it. H. had excavated his land in some places to within a few inches of the dividing line, close to which the house in question stood. This house had been built by S. in 1854, when he had a lease of the lot for ten years, which gave him the right to remove it at the expiration of the term, upon oak planks laid about one foot under the ground. In 1856, however, he acquired the fee, and in 1870, he also became owner of the lot now owned by H., and held it for a year, when he conveyed it to E. H. from whom H. derived title. There was no evidence to shew that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in the ordinary way:—Held, that owing to the unity of seizin of S., there had not been twenty years continuous enjoyment of the support as an easement; but that even if there had been, no such acquiescence in the use of the servient tenement had been shewn as to justify the presumption that an easement had been acquired by grant. *Backus v. Smith et al.*, 5 A. R. 341.

III. PERSONAL ACTIONS.

The period for bringing an action against a clerk of a municipality for omitting names from the collector's roll is not limited to two years under R. S. O. c. 61 s. 1. *Corporation of Peterborough v. Edwards*, 31 C. P. 231.

To a declaration charging negligence in the construction and maintenance of drains, in order to drain the streets of a town, whereby the drains were choked and the sewage matter overflowed into plaintiff's premises, defendants pleaded that the cause of action did not accrue within three months:—Held, bad, as sec. 491 of the Municipal Act, R. S. O., c. 174, did not apply. *Sullivan v. The Corporation of the Town of Barrie*, 45 Q. B. 12.

In an action by the plaintiff against the defendant as administrator of his deceased brother W. G. as to an amount of \$800 which the plaintiff alleged that W. G. received for her from another brother S. G. also deceased, the evidence shewed that S. G. at the time of his death directed W. G., to whom he left the rest of his property, to pay the plaintiff the \$800, and W. G., after S. G.'s death informed the plaintiff that he was taking charge of the money for her:—Held, that W. G. was a trustee for the plaintiff under an express trust, and therefore, that under the O. J. Act, s. 17, sub-s. 2, the Statute of Limitations would not constitute a bar to the claim. *Cook v. Grant*, 32 C. P. 511.

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full; and as against an executor claiming as creditor, any other creditor may set up the Statute of Limitations. *Re Ross*, 29 Chy. 385.

The bill of exchange in this action fell due on 1st December, 1875, and the writ issued on the 1st December, 1881:—Held (Cameron, J., dissenting) that the statute began to run on the

2nd December, 1875, and therefore that this action was commenced in time. *Sinclair v. Robson*, 16 Q. B., 211, remarked upon. Per Armour, J. Though the holder of a bill may put himself in a position to commence his action on the day the bill falls due by demanding and being refused payment, he is not bound to do so; and if he does not, the acceptor has the whole of the day of maturity in which to pay the bill, and the statute does not commence to run until the day after. Quære, whether even in case of such demand and refusal, the statute will begin to run on that day. Per Cameron, J. Inasmuch as by C. S. U. C. c. 42, s. 15, the bill might have been protested at any time after three o'clock on the day it fell due it was then overdue, and the action was commenced too late:—Held, also, that the plaintiff, under the facts stated in the report, had established his right to sue upon the bill. *Edgar v. McGee*, 1 O. R., Q. B. D. 287.

Held, reversing the judgment of the county court that notwithstanding R. S. O. c. 125 s. 20, a married woman is still entitled under 21 Jac. 1, c. 16, to bring an action in respect of her separate property within six years after becoming discover. *Carroll v. Fitzgerald*, 5 A. R. 322.

Where A., one of two residuary legatees and executors, left the collection of the outstanding assets of the deceased entirely to B., the other residuary legatee and executor, under an agreement between them, by which B. was to remit a moiety when a certain specified amount was collected, and it appeared that the residue was ascertained or could have been ascertained within a year from the testator's death:—Held, that A.'s claim to what was so collected more than ten years before action brought was barred by the Statute of limitations, but as to what was got in by B. afterwards A. was entitled to recover:—Held, also, that the fact of the fund in B.'s hands having been from time to time drawn upon to make good deficiencies in the general legacies, so that the residue was not precisely and for all purposes ascertained, did not prevent the bar of the statute; neither was there any fiduciary relationship between A. and B., such as to have that effect. Quære, whether, if the money collected by B. could have been specifically traced and followed, the court would allow this to be done, notwithstanding the lapse of ten years:—Held, lastly, that the bar of the statute applied not only to assets distributed by B., but also to assets retained by him. *Re Kirkpatrick, Kirkpatrick et al. v. Stevenson et al.*, 3 O. R., Chy. D. 361.

Where in an action for a partnership account on a contract for work done on a canal, it appeared that the business had been closed, the books made up, a final estimate obtained, and the plant sold, more than six years before the commencement of the action:—Held, that the plaintiff was barred by the Statute of Limitations, and the fact that within the six years, a certain sum had been paid over to the plaintiff's solicitors, but without his knowledge, as the full amount of the partnership profits due to the plaintiff, could not operate to take the case out of the statute. *Cotton v. Mitchell et al.*, 3 O. R., Chy. D. 421.

A testator directed a sum of money to be invested, the interest whereof was to be employed

in endeavouring to discover his brother, to whom the money was to be paid if discovered within five years from the death of the testator, and if not so found the amount to be paid to M. C. The executors took the bond of the persons liable to pay the amount to the estate, and subsequently an instalment payable under such bond was recovered by the executors and paid over to M. C. Afterwards the balance was recovered by one of the executors, who invested it in his business, and sought to defeat a suit to compel payment of the amount at the instance of the personal representative of M. C., by setting up the Statute of Limitations; more than ten years having elapsed since M. C. had become entitled to the bequest:—Held, (affirming the decree of the court below, 27 Chy. 307,) that the conduct of the executors constituted them trustees, and that the right to recover the money was not barred by the Statute of Limitations; and that C., into whose hands the money had come, was chargeable with interest from the time of its receipt by him. *Cameron v. Campbell*, 7 A. R. 361.

The effect of letters written by the company's president after the original claim had been barred, and of reports made to the company of claims against them in which the plaintiff's claim was included, discussed as to their sufficiency to revive the claim. *Shanly, Executrix of Shanly v. Grand Junction Railway Co.*, 4 O. R., Q. B. D. 156.

See also *Crone v. Crone*, 27 Chy. 425 p. 10. *Re Laws—Laws v. Laws*, 28 Chy. 382, p. 325; *Ross v. Pomeroy*, 28 Chy. 435, p. 423.

LIQUIDATED DAMAGES.

See PENALTY BY CONTRACT.

LIQUIDATED DEMAND.

See COUNTY COURT.

LIQUOR.

See PARLIAMENTARY ELECTIONS—TAVERNS AND SHOPS.

LOAN COMPANY.

See BUILDING SOCIETIES.

LOANS OF MONEY.

Loans by municipalities to manufacturing companies. See *Scottish American Investment Co. v. Corporation of the Village of Elora*, 6 A. R. 628.

Quære, whether the power to give would not include power to lend. *Ib.*

Where money is lent to be repaid when the borrower is able, his ability may be shewn by a slight amount of evidence, such as is open to

public observation, of a flourishing condition of his affairs, and it is not necessary to shew that the borrower is in a position to discharge the debt without inconvenience. *Re Ross*, 29 Chy. 385.

LOCAL MASTERS.

Held, that the local masters who are paid by fees instead of salary, are entitled to charge one dollar per hour in money under chancery tariff, of 23rd March, 1875, when taxing costs. *McGannon v. Clarke*, 9 P. R. 555.—Boyd.

LORD'S DAY.

See SUNDAY.

LOST DEEDS.

EVIDENCE OF—See EVIDENCE.

LOTTERY.

See GAMING.

LUNATIC.

I. APPLICATION FOR DECLARATION OF LUNACY, 440.

II. APPOINTMENT OF GUARDIAN, 440.

III. CONTRACTS AND DEALINGS WITH, 440.

IV. MISCELLANEOUS CASES, 441.

V. MENTAL INCAPACITY.—See FRAUD AND MISREPRESENTATION—WILL.

I. APPLICATION FOR DECLARATION OF LUNACY.

An application was made by petition to declare R. a lunatic, and the petitioner failing to produce sufficient medical testimony, asked for an order dismissing the petition. Proudfoot, V.C., declined to make such order, but made an order declaring that the court did not see fit to make any order on the application. *Re Randall*, 8 P. R. 202.

II. APPOINTMENT OF GUARDIAN.

On an application under Rule 69, O. J. Act, for an order appointing the official guardian the guardian of one of the defendants, a person of unsound mind, not so found:—Held, that the motion should be made before the master in chambers. *Crawford v. Crawford*, 9 P. R. 178.—Proudfoot.

III. CONTRACTS AND DEALINGS WITH.

The plaintiffs made certain necessary repairs upon the defendant's vessel. At the time the agreement for the repairs was made, one of the plaintiffs knew that the defendant was sub-

ject to insane delusions, believing that people were conspiring against him to do him some injury. He, however, superintended the repairs, and talked intelligently to the workmen employed about the vessel; but some months after he became violent, and was confined in an asylum for the insane:—Held, that the plaintiffs were entitled to recover for the work done. *Robertson et al. v. Kelly*, 2 O. R., Q. B. D. 163.

J., an infant, gave to M. a promissory note for the purchase money of a buggy, endorsed by his father, who was of unsound mind, and unable to understand what he was doing. The father received no consideration, and M. was not aware of his condition:—Held, on appeal from the master at Woodstock, affirming his decision, that the father's estate was not liable. *Re James*, 9 P. R. 88.—Boyd.

IV. MISCELLANEOUS CASES.

Where a person of unsound mind sues by a next friend the usual præcipe order that the plaintiff do produce is proper and is sufficiently obeyed by the affidavit of the next friend. *Travis v. Bell*, 8 P. R. 550.—Boyd.

The common law right as to the priority of an execution creditor of a lunatic, who has an execution in the hands of the sheriff before the lunatic has been declared such, will not be interfered with by injunction restraining him from realizing under his writ. *In re Grant, a lunatic*, 28 Chy. 457.

On a sale of the land of an infant under R. S. O. c. 40. ss. 75-83 an order was made under 44 Vict. c. 14, s. 5, Ont., barring the dower of the infant's mother who was a lunatic and confined in an asylum. *Re Colthart*, 9 P. R. 356.—Ferguson.

MACHINERY.

WHEN FIXTURES—See FIXTURES.

MAGISTRATES.

See JUSTICES OF THE PEACE—SESSIONS.

MAINTENANCE.

I. OF INFANTS—See INFANT—WILL.

II. OF SUITS—See CHAMPERTY.

MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

I. MALICIOUS ARREST.

II. MALICIOUS PROSECUTION, 442.

1. *Reasonable and Probable Cause*. 442.

III. OTHER PROCEEDINGS.

1. *Proceedings in Bankruptcy and Insolvency*, 443.

IV. NEW TRIAL IN CASE OF—See NEW TRIAL.

I. MALICIOUS ARREST.

1. *Reasonable and Probable Cause*.

The declaration alleged that the defendant laid an information that certain harness had been stolen by the plaintiff, whereas the information proved was qualified by the addition of the words "as he supposed:—Held, affirming the judgment of the County Court, no variance. It was shewn that the information was laid by the defendant on the advice of the magistrate, and that he did not interfere in the issue of the warrant for the plaintiff's arrest, but it was proved that the information contained the substance of the statements made by the defendant, which justified the warrant:—Held, there being an absence of reasonable and probable cause, that the defendant was liable. *Colbert v. Hicks*, 5 A. R. 571.

S., a debtor resident in Ontario, being on the eve of departure for a trip to Europe, passed through the city of Montreal, and while there refused to make a settlement of an overdue debt with his creditors, McK. et al., who had instituted legal proceedings in Ontario to recover their debt, which proceedings were still pending. McK. et al. thereupon caused him to be arrested, and S. paid the debt. Subsequently S. claimed damages from McK. et al. for the malicious issue and execution of the writ of capias. McK. et al., the respondents, on appeal, relied on a plea of justification, alleging that when they arrested the appellant, they acted with reasonable and probable cause. In his affidavit the reasons given by the deponent McK., one of the defendants, for his belief that the appellant was about to leave the Province of Canada, were as follows:—"That Mr. P., the deponent's partner, was informed last night in Toronto by one H., a broker, that the said W. J. S. was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and defendant was himself informed, this day, by J. R., broker, of the said W. J. S.'s departure for Europe and other places." The appellant S. was carrying on business as a wholesale grocer at Toronto, and was leaving with his son for the Paris exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker and all his business friends knew that he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving with intent to defraud. There was also evidence given by McK., that after the issue of the capias, but before its execution, the deponent asked plaintiff for the payment of what was due to him, and that plaintiff answered him "that S. would not pay him, that he might get his money the best way he could":—Held, that the affidavit was defective, there being no sufficient reasonable and probable cause stated for believing that the debtor was leaving with intent to defraud his creditors: and that the evidence shewed the respondent had no reasonable and probable cause for issuing the writ of capias in question. *Shaw v. McKenzie, et al.*, 6 S. C. R. 181.

See *Reid v. Maybee*, 31 C. P. 184.

II. MALICIOUS PROSECUTION.

In an action for malicious prosecution, the information and warrant of commitment merely disclosed a civil trespass. The plaintiff was non-

sued at the trial. It appeared, however, that the defendants had not disclosed the whole facts to the magistrate, and that, at the hearing, on the plaintiff's solicitor objecting that no criminal offence was charged, one of the defendants said that in order to have the case investigated he would charge the plaintiff with stealing the oats. The statement of claim alleged that the defendants had charged the plaintiff with felony. The Court set aside the nonsuit, and granted a new trial, with leave to the plaintiff to amend the statement of claim according to the facts. Per Wil-son, C. J. Semble, that the facts stated above were evidence that the defendants were putting the criminal law in motion and, the information and warrant being invalid, they were liable as trespassers. Per Osler, J. Quære, as to this, and whether an action for malicious prosecution will lie for making a false and malicious statement to a magistrate, shewing nothing which conferred jurisdiction on him, but on which, nevertheless, he acts by issuing a warrant. *Macdonald v. Henwood et al.*, 32 C. P. 433.

In an action for malicious prosecution the want of reasonable and probable cause does not necessarily establish that malice which is requisite to maintain the action. Therefore where the jury were directed, in the course of the charge, that if a person makes a charge against another for the purpose of his being arraigned upon it without being justified in point of law, then he does it maliciously: that they need not trouble themselves with a question of malice except as it might be inferred from want of reasonable and probable cause, and that if the information had been laid without proper cause the result would be that it was laid maliciously; and the plaintiff obtained a verdict of \$500:—Held, misdirection, for which a new trial should be granted. Per Hagarty, C. J., dissenting. Though the directions standing alone might be open to criticism, the charge must be read as a whole; but as the jury were afterwards told repeatedly that they should find for defendant if they thought that he believed the matters sworn to in his information, there was no misdirection which would warrant interference with the plaintiff's verdict. Where the damages are large, and to a great extent sentimental, this may well be considered in deciding whether there has been a substantial wrong caused by a clear misdirection. *Winfield v. Kean*, 1 O. R., Q. B. D. 193.

III. OTHER MALICIOUS PROCEEDINGS.

1. Proceedings in Bankruptcy and Insolvency.

Held, by Galt, J., that an action will lie by a debtor against a creditor to recover damages for falsely and maliciously making a demand for an assignment, under the 4th sec. of the Insolvent Act of 1875, and amending Acts, and that his remedy is not confined to the imposition of treble costs under sec. 5. *Nagle v. Timmins et al.*, 31 C. P. 221.

To such action, the defendants' third plea, after setting up a variety of dealings between the parties shewing that the plaintiff had from time to time failed to meet his engagements with defendants, concluded, that the plaintiff being indebted to the defendants in the sum of \$1,400, and being unable to pay the same or to meet his

engagements, and the plaintiff being also, to the knowledge of the defendants, indebted in large sums to divers other persons, creditors of the plaintiff, the defendants bona fide believing the plaintiff to be insolvent within the meaning of the Insolvent Act of 1875, and amending Acts, and having reasonable and probable cause for so believing, and without malice, made a demand on the plaintiff, &c:—Held, a good plea, although it was not expressly averred, in the words of sec. 4, that the plaintiff had ceased to meet his liabilities generally as they became due. Quære, whether that expression means his liabilities to the particular creditor, or to his creditors generally. *Id.*

MALICIOUS INJURY TO PROPERTY.

See *Regina v. Gough*, 3 O. R. 402, p. 187.

MALICIOUSLY WOUNDING.

See *Regina v. Boucher*, 8 P. R. 20; 4 A. R. 191, p. 187.

MANDAMUS.

I. POWER OF COURT OF CHANCERY, 444.

II. TO COUNTY COURT JUDGES AND CLERKS, 444.

III. TO SESSIONS, 445.

IV. TO MUNICIPAL CORPORATIONS AND OFFICERS, 445.

1. To pass By-laws or issue Debentures in aid of Railways—See RAILWAYS AND RAILWAY COMPANIES.

V. TO RAILWAY COMPANIES.

1. Registration of Bonds—See RAILWAYS AND RAILWAY COMPANIES.

VI. APPEAL, 446.

I. POWER OF COURT OF CHANCERY.

Under R.S.O. c. 40, s. 86, c. 49, s. 21, and c. 52, s. 4, et seq., the Court of Chancery could exercise the powers of a court of law in any proceeding, and the powers of the Common Law Courts to grant mandamus upon motion not being by the latter Act restricted, the Court of Chancery might also have granted a mandamus upon motion; and under the Judicature Act, nothing appearing to restrict the jurisdiction, the Chancery Division of the High Court of Justice has the same jurisdiction. *Re Board of Education of Napanee and The Corporation of the Town of Napanee*, 29 Chy. 395.

II. TO COUNTY COURT JUDGES AND CLERKS.

Where a County Court Judge improperly refuses to hear the argument of a rule nisi, mandamus is the proper remedy; and where the refusal to hear had been caused by an unmeritorious objection deliberately taken and insisted

upon by defendant, he was ordered to pay the costs of the application for mandamus. *In re Dean v. Chamberlin*, 8 P. R. 303.—Osler.

To County Court Clerk to enter up judgment. See *Re Great Western Advertising Co. v. Rainer*, 9 P. R. 494, p. 160.

The appointment of a creditor as administrator is not as of right, but rests in the discretion of the judge who appoints, and that cannot be interfered with by any peremptory writ; and R.S.O. c. 46, ss. 32, 36, do not better the claim of a creditor. *Re O'Brien*, 3 O. R., Chy. D. 326.

See also *Regina ex rel. Grant v. Coleman*, 7 A. R. 619.

III. To SESSIONS.

A minute of conviction signed by the justice, but not sealed, was returned to the sessions upon the entering of an appeal therefrom by the defendants. The jury found the defendant guilty of the offence of which he had been convicted, but on motion for judgment he objected that the conviction was not sealed. The chairman reserved judgment, and during the adjournment the justice returned and filed a conviction under seal. The chairman then declined to receive it, or to give judgment, holding that there was no conviction upon which to found the appeal, which had been heard:—Held, that the prosecutor was not entitled to a mandamus to compel him to deliver judgment; for the reception of the conviction in evidence at that period was in the chairman's discretion which could not be reviewed. *In re Ryer and Plows*, 46 Q. B. 206.

The Court of Queen's Bench has no power to grant a mandamus to compel the sessions to rehear an appeal. *Regina v. Grainger*, 46 Q. B. 382.

IV. To MUNICIPAL CORPORATIONS.

The defendants in 1865 passed a by-law for the construction of a drain which went through the plaintiff's land, and for assessing certain lands, including the plaintiff's, therefor. The drain was commenced in 1866 and completed. In 1873 they passed another by-law for widening and deepening this drain, which was accordingly done. In 1881, they constructed another drain running into the first below the plaintiff's land. The first drain having become out of repair and choked up, the plaintiff's lands were to some extent flooded in the spring and autumn, and the water lay longer than if the drain had been kept properly clear:—Held, affirming the judgment of Hagarty, C. J., (Cameron, J. dissenting) that the plaintiff was entitled to recover against the defendants for their breach of duty in not keeping the drain in repair under R. S. O. c. 174, s. 543, and that a mandamus should issue to compel the defendants to make the necessary repairs. Per Cameron, J.—An action is expressly given by s. 542 for injury done by such neglect, where the drain serves two municipalities; but in a case like the present, though under s. 543 the municipality may be compelled by mandamus to repair the drain at the expense of the lands benefited, no action lies for injury caused by non-repair. *White v. Corporation of Township of Gosfield*, 2 O. R., Q. B. D. 287.

Mandamus to municipal corporation to levy rates for High School Board. See *In re High School Board of High School District No. 4, of the United Counties of Stormont, Dundas, and Glengarry and the Municipal Corporation of the Township of Winchester, in the County of Dundas, and In the matter of the said High School Board and the Municipal Corporation of the Township of Williamsburg, in the County of Dundas*, 45 Q. B. 460.

There having been a misnomer in the names of the applicants, per Armour and Cameron, JJ., such misnomer not having been objected to on the argument below might be amended. Per Hagarty, C. J., in such a case no amendment should be granted as a matter of discretion. *Id.*

To Board of Audit in cases relating to fees of County Attorneys. See *In re Fenton, County Crown Attorney for the County of York and the Board of Audit for the County of York*, 31 C. P. 31 p. 165. *In re Stanton and the Board of Audit of the County of Elgin*, 3 O. R. 86 p. 166.

VI. APPEAL.

Held, that the appeal in cases of mandamus under s. 23 of the Supreme and Exchequer Court Act is restricted by the application of s. 11 to decisions of "the highest court of final resort" in the Province and that an appeal will not lie from any court of the province of Quebec but the Court of Queen's Bench. Fournier and Henry, JJ., dissenting. *Danjou v. Marquis* 3 S. C. R. 251.

MANSLAUGHTER.

See CRIMINAL LAW.

MANUFACTORIES.

BONUS BY WAY OF AID TO—See MUNICIPAL CORPORATIONS.

MARINE INSURANCE.

See INSURANCE.

MARITIME COURT.

Where a disputed fact involving nautical questions is raised by an appeal from the judgment of the Maritime Court of Ontario, as in the case of a collision, the Supreme Court will not reverse the decree of the judge of the court below merely upon a balance of testimony. *The Pictou — McCuaig et al. v. Keith*, 4 S. C. R. 648.

Held, that 40 Vict. c. 21, establishing a court of maritime jurisdiction for the province of Ontario, is intra vires of the Dominion Parliament. *Id.*

The appellant's child, a minor, was killed in a collision between two vessels by the negligence of the officers in charge of one of them ("The Garland.") Petition against "The Garland"—libelled under the Maritime Court Act at the port of Windsor—on behalf of the appellant claiming \$2,000 damages suffered by her, owing

to the death of her son and servant, caused by the negligence of the officers in charge of the said "Garland." The respondent intervened, and demurred on the ground that the petition did not set forth a cause of action against "The Garland" within the jurisdiction of the court:—Held, (Fournier and Taschereau, JJ., dissenting), that the Maritime Court of Ontario has no jurisdiction apart from R. S. O. c. 128 (re-enacting in that province Lord Campbell's Act, 9 & 10 Vict. c. 93), in an action for personal injury resulting in death, and therefore the appellant had no locus standi, not having brought her action as the personal representative of the child. Per Fournier, Taschereau, Henry, and Gwynne, JJ., (reversing the judgment of the Maritime Court of Ontario), that Vice-admiralty Courts in British possessions and the Maritime Court of Ontario, have whatever jurisdiction the High Court of Admiralty has over "any claim for damages done by any ship, whether to person or to property." Per Fournier and Taschereau, JJ., dissenting, that apart from and independently of R. S. O. c. 128, the Maritime Court of Ontario had jurisdiction in a proceeding in rem against a foreign vessel for the recovery of damages for injuries resulting in death; that the appellant, either in the capacity of parent or of mistress, was entitled to claim damages for the loss of her son or servant. *In re The Garland—Monaghan v. Horn*, 7 S. C. R. 409.

MARRIAGE.

See HUSBAND AND WIFE.

MARSHALLING

See *Clark v. Bogart*, 27 Chy. 450.

MASTER.

See LOCAL MASTERS—PRACTICE.

MASTER AND SERVANT.

I. CONTRACT OF HIRING.

1. *What Amounts to a Yearly Hiring*, 447.
2. *Other Cases*, 448.

II. RIGHTS OF MASTER AND SERVANT.

1. *Actions for Wages*, 449.
2. *Wrongful Dismissal*, 449.

III. LIABILITY OF MASTER FOR ACTS OF SERVANT, 450.

IV. INJUNCTION TO RESTRAIN INTIMIDATION OF SERVANTS, 451.

I. CONTRACT OF HIRING.

1. *What Amounts to a Yearly Hiring*.

In an action on a verbal agreement made in November, for the hiring of plaintiff by defen-

dant for a year from the 1st of December then next:—Held, that there could be no recovery for wrongful dismissal, the agreement being one not to be performed within a year; and that there being an express agreement in fact, no other agreement for a monthly hiring could be implied. *Harper v. Davies*, 45 Q. B. 442.

Held, reversing the judgment of the County Court of York, that a contract of hiring for a year or more defeasible within the year, is within the fourth section of the Statute of Frauds. The agreement, as alleged by the plaintiff, was made in February, 1880, whereby the defendant was to pay him for his services while he should remain in defendant's employment, at the rate of \$500 a year, for one year, and thereafter at such salary as might be agreed upon; the plaintiff to enter upon his duties, and his salary to commence on the 3rd of March, then next, and defendant was to be at liberty to determine the employment at the expiration of a month named, otherwise the agreement to remain in full force for a year, and for such longer period as might be agreed upon;—Held, clearly within the statute. *Booth v. Prittie*, 6 A. R. 680.

2. Other Cases.

Municipal officers appointed by the council hold office during the pleasure of the council, and may be removed without notice and without cause. *Wilson v. York*, 46 Q. B. 289.

Where the plaintiff was engaged by the defendant for "the season," i. e., from early in May till some time in November, as master to manage the steamer "Idyl-Wyld" for \$1000, and he continued so employed until September, when the steamer was burnt:—Held, that the plaintiff was not entitled to more than the proportionate share of the salary agreed upon, for the contract was subject to the continued existence of the vessel, and performance was excused by its destruction without the default of the defendant. *Ellis v. The Midland, R. W. Co.*, 7 A. R. 464.

The plaintiff's testator was chief engineer of the defendant company from its inception until arrangement made by the company with one B. for the completion of the road by B., he paying all expenses, &c., including the engineer's salary. In 1851 the testator wrote a letter to the solicitor for the Grand Trunk Railway Company, which company was about to resume control of the defendants' railway, claiming for services rendered the defendant company up to the middle of 1875. The action was commenced in February, 1882, for services rendered from 1871 to 1875. At the trial an amendment was made allowing the plaintiff to claim for services rendered up to 1880. It appeared that the testator was to have had a salary, but the amount was never fixed. During the period from 1875 to 1880 or 1881 he performed services as engineer for the defendant company, certifying to work done, that the company might obtain bonuses, attending meetings and deputations. He also approved of plans of a bridge submitted to him, and in 1878 signed the specifications appended to the contract between the company and B.:—Held, Hagarty, C. J., dissenting, that there was evidence to go to the jury of a continuing employment of the testator subsequent to 1875, and

of services rendered as chief engineer within the six years preceding action, notwithstanding the letter written by the testator claiming for services up to 1875 only; and that any inference to be drawn from the writing of the letter was for the jury and not for the judge to draw; and a nonsuit was set aside. *Per Hagarty, C. J.* The evidence shewed that the testator, though nominally chief engineer of the defendant company subsequent to the contract with B., was in fact working for B. to whom he looked for payment. The effect of letters written by the company's president after the original claim had been barred, and of reports made to the company of claims against them in which the plaintiff's claim was included, discussed as to their sufficiency to revive the claim. *Shanly, Executrix of Shanly v. Grand Junction R. W. Co., 4 O. R., Q. B. D. 156.*

II. RIGHTS OF MASTER AND SERVANT.

1. Action for Wages.

Right to investigate accounts &c. where employee has a share in the profits in lieu of remuneration. *R. S. O. c. 133 s. 3.* See *Rogers v. Ullmann, 27 Chy. 137.*

To an action by a commercial traveller for wages defendants pleaded a discharge in insolvency the plaintiffs replied that the claim was privileged:—Held, reversing the judgment of the Queen's Bench, 45 Q. B. 188, that privileged claims are not within the class of debts mentioned in s. 63 of the Insolvent Act 1875 to which a discharge does not apply without the consent of the creditor. *Fryer v. Shields, 6 A. R. 57.*

2. Wrongful Dismissal.

The plaintiff agreed with the defendant to serve him as a manager of a tannery for six years, the agreement reciting that he was to manage the works while the defendant was to furnish the capital. He also agreed to disclose to the defendant a secret process of tanning, which defendant was not to use after the agreement, except in connection with plaintiff, and to manufacture the leather according to such process. The defendant discharged the plaintiff after about seven months, alleging, amongst other things, that he was not a practical tanner, and that he was not using the secret process, and had not disclosed it to the defendant:—Held, reversing the judgment of Proudfoot, V. C., 27 Chy. 86, that the plaintiff was a practical tanner within the meaning of the agreement; and that the manufacture of leather was being carried on according to the secret process, and that as no time was limited for disclosing such process, the defendant, who had never asked for the disclosure, had no right to dismiss the plaintiff for its non-disclosure. A reference was therefore directed as to the damages sustained by the failure of the defendant to perform his part of the agreement, and for the dismissal. *Blake v. Kirkpatrick, 6 A. R. 212.*

The plaintiff renewed his engagement for a year with the defendant company at Hamilton to serve them in the capacity of book-keeper. Before the expiry of the time agreed for, P., one of the managers of that branch of the company, removed the books from the possession of the plaintiff, placing another in charge thereof and

telling the plaintiff that he did not any longer require his services, but that if W., another officer of the company, had anything for him to do outside he would be very glad, adding, "But I have no further service for you in the office, in fact I do not want you in the office." The plaintiff refused to recognize the right of P. to thus remove him, and it was arranged between plaintiff, W. and P., that plaintiff should remain occupying his time with other work until it was ascertained from the head office if P. had the authority he asserted; and on obtaining information in the affirmative, plaintiff left:—Held, affirming the judgment of the Court below, that the action of the defendants was a dismissal of the plaintiff. *Lash v. The Meriden Britannia Company, 8 A. R. 680.*

III. LIABILITY OF MASTER FOR ACTS OF SERVANT.

Selling liquor without license.—Liability of servant. See *Regina v. Howard, 45 Q. B. 346.*

The plaintiff, being engaged in the service of the defendants in repairing a bridge, was injured by the fall of the hammer of a pile-driver, caused, as was found, by the negligence of one M. The work was being performed in R.'s section, R. being a councillor, and M., who was the reeve of the municipality, was employed at day wages by R. as foreman:—Held, that M., though reeve, was not acting in that capacity, but as a hired fellow servant with the plaintiff; that there was nothing to so identify the defendants with him in the work, as their chief officer, as to take the case out of the ordinary rule governing the relation of fellow servants; and that the plaintiff therefore could not recover. *Drew v. The Corporation of the Township of East Whitby, 46 Q. B. 107.*

The plaintiff who had purchased a special excursion ticket from Toronto to Niagara and return on the same day by a steamer of the defendants, and which had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding the plaintiff's fare, and the latter refusing to pay it, the porter by the purser's direction, laid hold of a valise which the plaintiff was carrying, and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured:—Held, Osler, J., dissenting, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act. *Emerson v. The Niagara Navigation Co., 2 O. R., C. P. D. 528.*

It appeared that the purser had been summoned by the plaintiff before a magistrate for the assault, and a fine imposed, which he paid. *Per Wilson, C. J.* This, under 32-33 Vict. c. 20, s. 45, D., through a release to the purser, did not constitute any bar to the present action against the company. *Id.*

Held, also, that the alleged imprisonment of the plaintiff by the purser in his office for non-payment of his fare, not being an act which the defendants themselves could legally have done, the defendants were not liable for it. *Id.*

Liability of municipal corporation for act of collector.—Respondent superior. See *McSorley v. The Mayor, &c., of the City of St. John et al.*, 6 S. C. R. 531.

Liability of crown for negligence of its servants. See *Regina v. McFarlane*, 7 S. C. R. 216.

IV. INJUNCTION TO RESTRAIN INTIMIDATION OF SERVANTS.

See *Hynes et al. v. Fisher et al.*, 4 O. R. 60, p. 348.

MAXIMS.

The rule that "he who comes for equity must do equity" considered and applied. *Clemow v. Booth*, 27 Chy. 15.

The maxim that the Crown can do no wrong applies to alleged tortious acts of the officers of a public department of Ontario. *The Muskoka Mill Co. v. The Queen*, 28 Chy. 563.

Where a widow who had married again filed a bill alleging that she had accepted the provisions and bequests given to her by will in ignorance of her right to dower, had she elected to take dower; and in her evidence she swore that she had been ignorant of such right until advised in respect thereof in 1880, shortly before her second marriage, and she now sought to have dower assigned to her:—Held, that the rule "Ignorantia juris neminem excusat" applied, and the bill was dismissed with costs. *Gillam v. Gillam*, 29 Chy. 376.

The maxim "respondent superior" applied in an action against a municipal corporation for act of collector. See *McSorley v. The Mayor, &c., of the City of St. John et al.*, 6 S. C. R. 531.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANICS' LIEN.

See LIEN.

MEDICAL PRACTITIONER.

A medical practitioner registered in Great Britain, to entitle himself to practise in this Province, must be registered under R. S. O. c. 142, s. 21. In this case the plaintiff, a practitioner registered in Great Britain, but not in this Province, claiming to be entitled to practise here, brought an action against the defendant for slandering him in his profession, by stating that he was a quack, &c. :—Held that the action was not maintainable. *Skirving v. Ross*, 31 C. P. 423.

Where defendant, in partnership with two registered practitioners, resided in an establishment over the door of which was a fan-light containing the names of the registered practitioners, with the additions "M. D., M.C.P. & S., Ont., and

the name of the defendant with only the addition "M. D." :—Held, that the use of the simple letters "M. D." in contradistinction to the full titles of the partners of defendant appearing on the same fan-light, was not the use of a title "calculated to lead people to infer" registration, and that defendant therefore could not be convicted under s. 42 of the Ontario Medical Act, R. S. O., c. 142. *Regina v. Tefft*, 45 Q. B. 144.

MEMORIAL.

Proof of deed by. See *Van Velsor et al. v. Hughson*, 45 Q. B. 252, p. 255.

MENTAL INCAPACITY.

See FRAUD AND MISREPRESENTATION—LUNATIC—WILL.

MERGER.

OF MORTGAGE DEBTS—See MORTGAGE.

MESNE PROFITS.

See EJECTMENT.

Right to mesne profits in action of Dower. See *Ryan v. Fish. et al.*, 4, O. R. 335 p. 227.

MINES.

Right of railway to expropriate. See *Jenkins et al. v. The Central Ontario R. W. Co.*, 4 O. R. 593, p. 344.

[See 47 Vict. c. 30, Ont.]

MISDIRECTION.

See NEW TRIAL.

MISNOMER.

Quære as to the effect of the defendants being described in the note in question in this case as the "Watertown Insurance Company" while the real name was "The Agricultural Insurance Company of Watertown, N.Y." See *Sears v. The Agricultural Ins. Co. et al.*, 32 C. P. 585.

There having been a misnomer in the names of the applicants per Armour and Cameron JJ. such misnomer not having been objected to on the argument below might be amended. Per Hagarty, C. J. in such a case no amendment should be granted as a matter of discretion. *In re High School Board of High School District No 4 of the United Counties of Stormont, Dundas, and Glengarry, and the Municipal Corporation of the Township of Winchester in the County of Dundas and In the matter of the said High School Board and the*

Municipal Corporation of the Township of Williamsburg in the County of Dundas, 45 Q. B. 460.

The deed to the defendant company described it by its original name of the P. H. L. & B. R. Co., when in fact its name had been changed:—Held, a sufficient descriptive personæ, to enable the company to take, though it might not be sufficient to sue in. *Grand Junction R. W. Co. v. Midland R. W. Co.* 7 A. R. 681.

MISREPRESENTATION.

SEE FRAUD AND MISREPRESENTATION.

MISTAKE.

I. IN DEEDS AND OTHER WRITINGS, 453.

1. *Rectifying Mistake in Deeds*—See DEED.

II. MISCELLANEOUS CASES, 453.

III. IN ASSESSMENT ROLLS AND VOTERS LISTS—See PARLIAMENTARY ELECTIONS.

IV. MISTAKEN BOUNDARIES—See LIMITATION OF ACTIONS AND SUITS.

V. IN SURVEYS—See SURVEY.

I. IN DEEDS AND OTHER WRITINGS.

The premises intended to be conveyed by a deed were described therein as 180 acres of the east halves of two lots, "commencing at the front east halves of said lots, taking the full breadth of each half respectively, and running northwards, so far as required to make ninety acres of each east half lot:—Held, that "northwards" might be rejected, being evidently a mistake for "westward." *Ferguson v. Freeman*, 27 Chy. 211.

Erroneous description of lands in wills. See *Re Callaghan*, 8 P. R. 474; *Holtby v. Wilkinson*, 28 Chy. 550.

Mistake in computation of amount due on mortgage. See *Stark v. Shepherd*, 29 Chy. 316.

Life assurance effected for \$1,000 only and policy issued by mistake for \$2,000. See *The Aetna Life Ins. Co. v. Brodie*, 5 S. C. R. 1.

Held, per Moss, C. J. A., that the policy of insurance in this case supplied internal evidence of a mutual mistake against which a Court of Equity would if necessary relieve. *Wright v. The Sun Mutual Life Ins. Co.*, 5 A. R. 218.

Error in date in deed of transfer. See *Pilon v. Brunet*, 5 S. C. R. 318.

Sale of Securities—Error in Schedule. See *The Real Estate Investment Co. v. The Metropolitan Building Society*, 3 O. R. 476.

II. MISCELLANEOUS CASES.

Payment of money into Court to credit of wrong cause. See *Johnston v. Johnston*, 9 P. R. 259.

Delivery by carrier at wrong destination. See *Monteith v. The Merchants' Despatch and Transportation Co.*, 1 O. R. 47; 9 A. R. 282.

Non-compliance with a condition in an insurance policy to put in the proof within 30 days. See *Robins v. The Victoria Mutual Fire Ins. Co.*, 6 A. R. 427.

In statement and return of Deputy Returning officer. See *Cameron v. Clucas*, 9 P. R. 405.

MONEY.

I. INTEREST—See INTEREST OF MONEY.

II. INVESTMENT—See INVESTMENT OF MONEY.

III. IN COURT—See INFANT—PAYMENT.

MONEY HAD AND RECEIVED.

See *Owston v. The Grand Trunk R. W. Co.*, 28 Chy. 423, 431.

MONEY LENT:

Where money is lent to be repaid when the borrower is able, his ability may be shewn by a slight amount of evidence, such as is open to public observation, of a flourishing condition of his affairs, and it is not necessary to shew that the borrower is in a position to discharge the debt without inconvenience. *Re Ross*, 29 Chy. 385.

MORTGAGE.

I. CONTRACTS OF MORTGAGE.

1. *Generally*, 456.

2. *Fraudulent*—See FRAUDULENT CONVEYANCES.

3. *Of Fixtures*—See FIXTURES.

4. *Of Goods*—See BILLS OF SALE AND CHATTEL MORTGAGES.

5. *Of Ships*—See SHIPS.

II. REGISTRATION OF—See REGISTRY LAWS.

III. PAYMENT, MERGER AND DISCHARGE.

1. *Payment*, 456.

2. *Merger of Mortgage Debt*, 457.

3. *Discharge and Certificate*, 458.

IV. RIGHTS AND LIABILITIES OF PARTIES AND THOSE CLAIMING UNDER THEM.

1. *Mortgagee in Possession*, 459.

2. *Right of Mortgagee to Maintain Actions*, 460.

3. *Rights and Liabilities of Purchasers of Equity of Redemption*, 460.

4. *Recovery of the Mortgage Money*.

(a) *When an Action will lie*, 461.

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(c) *By Distress*—See DISTRESS.

5. *Right to Growing Crops*, 462.
6. *Mortgagee purchasing at Sale of Mortgaged Premises*, 462.
7. *Sale of Equity of Redemption under Execution*, 462.
8. *Dower in Mortgaged Lands* — See DOWER.
9. *Insurance by or for Mortgagee—Right of Subrogation*—See INSURANCE.
10. *As affected by Mechanics Liens*—See LIEN.
11. *Barred by Time*—See LIMITATION OF ACTIONS AND SUITS.

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VI. SEVERAL MORTGAGES.

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IX. FORECLOSURE.

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2. *Parties*.
 - (a) *Creditors*, 470.
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3. *Final Order and Decree*, 471.
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XI. PROCEEDINGS IN MORTGAGE SUITS.

1. *Taking Accounts*, 474.
2. *Amendment of Statement of Claim*, 474.
3. *Costs*, 475.
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XII. MISCELLANEOUS CASES, 476.

XIII. MORTGAGES TO BUILDING SOCIETIES AND LOAN COMPANIES—See BUILDING SOCIETIES.

XIV. RECTIFYING AND VARYING MORTGAGES—See DEED.

XV. EJECTMENT BY MORTGAGEES—See EJECTMENT.

XVI. SALE OF LAND SUBJECT TO MORTGAGE—See SALE OF LAND.

I. CONTRACTS OF MORTGAGE.

1. Generally.

Quære, whether a conveyance absolute in form, though a mortgage in fact, comes within the Act 11 Geo. II. c. 19, s. 11, so as to authorize the mortgagee to give notice to receive an attornment from a tenant. *McLennan v. Hannum*, 31 C. P. 210.

The relation of landlord and tenant may be created by proper words between mortgagee and mortgagor for the bona fide purpose of further securing the debt, without being either a fraud upon creditors or an evasion of the Chattel Mortgage Act. *Trust and Loan Co. v. Lawrason, et al.* 6 A. R. 286.

The R. S. O. c. 25, s. 26, declares that any mortgage or lien created by the nominee of the Crown on lands for which the patent has not issued, shall in law and equity have the same force and effect, and no other, as if letters patent had before the execution of such instrument, been issued in favour of the grantor:—Held, that under this provision a mortgagor and mortgagee had all the rights and liabilities as between themselves that they would have had, had the freehold been actually vested in the mortgagor. *Watson v. Lindsay*, 27 Chy. 253; 6 A. R. 609.

J. and R., living at P., had dealings extending over several years with D. who lived at K., and borrowed money from him from time to time. To secure the money borrowed they executed a mortgage to D., purporting to be for \$4,000, but really intended as security for whatever should be due to them from time to time on the loan account. On taking the account in the Master's office some years afterwards, and after J. and R. had made an assignment in insolvency, it appeared that shortly after executing this mortgage, and before so much as \$4,000 had been advanced by D., J. and R. drew on D. for \$1,500:—Held that, under these circumstances, the presumption that D. owed J. and R. the \$1,500 drawn for, was rebutted, the draft being the natural mode in which J. and R. would procure an advance on the security of the mortgage to D. It appeared, also, that during the pendency of these transactions D. gave J. and R. a mortgage, held by him, to collect, and that J. and R. collected what was due on this mortgage, and retained the same. Held that the money so collected and retained was covered by the mortgage from J. and R. to D. *Court v. Holland et al.* 4 O. R., Chy. D. 688.

Contracts by Infants. See *Foley v. The Canada Permanent Loan and Savings Society* 4 O. R. 38, p. 335.

III. PAYMENT, MERGER, AND DISCHARGE.

1. Payment.

H., being seized in fee of certain lands, mortgaged them to W., and subsequently sold the

minerals thereon, with the right to mine, to the defendant. The mortgage being overdue, W. recovered judgment in ejectment and issued a writ of hab. fac. poss. Defendant hearing of this wrote to H. that the mortgage must be paid, and that he must give him an order to pay it and deduct the money so paid from the purchase money of the minerals. Thereupon a memorandum was drawn up that the defendant should either pay the mortgage in full discharge thereof, or take an assignment of it as a subsequent encumbrance, for the purpose of saving the interest of defendant, as also of said H. in the said lands, the amount so paid to be credited and allowed to defendant upon his purchase money of the minerals. Defendant paid the amount due on the mortgage, though his purchase money was not due to H. Afterwards H. put the plaintiff in possession of land to farm at a rental, and the defendant having obtained an assignment of the W. mortgage and judgment, evicted the plaintiff:—Held, Armour, J., dissenting, that the payment by defendant was in effect a payment by H., whereby the mortgage was satisfied, and as that payment was made for the purpose of saving H.'s interest as well as his own, the defendant would not have been justified in equity in enforcing the mortgage against H., or his assignee, the plaintiff; and that the plaintiff was entitled to damages for the trespass. Per Armour, J. The defendant was entitled either to pay the mortgage in discharge thereof, or to take an assignment of it as a subsequent encumbrancer; he did the latter; though he was to have been credited with this payment, his own payment to H. was not due, and the credit had not in fact been made; and he therefore had the right to enforce the mortgage. The plaintiff claimed \$500. The jury assessed the damages at \$1,500, and the learned Judge at the trial amended the statement of the claim accordingly. Held that the damages were excessive, and a new trial was granted. *Robinson v. Hall*, 1 O. R., Q. B. D. 266.

See *North of Scotland Mortgage Co., v. Uddell*, 46 Q. B. 511, p. 257.

2. Merger of Mortgage Debt.

In response to a notice from the plaintiffs, the mortgagees, of an instalment being due on the defendant's mortgage, the defendant's solicitor wrote that as defendant was unable to pay the claim, or redeem, and to save plaintiffs' costs, he would give them a conveyance of his equity of redemption. The plaintiffs thereupon conferred with H., their local agent and valuator, who advised them to take a deed, which they agreed to do, but only to enable them to sell the property, and defendant was to have any surplus over the mortgage debt, but that they would not release him from his covenant. An ordinary deed in fee simple was thereupon sent to defendant, and executed by him and his wife, H. at the time informing him that he was to have such surplus; and also then informed him as well as after the transaction had been closed wrote to him, that the plaintiffs would send a discharge, though without any authority from the plaintiffs to do so; and defendant stated that he signed on this understanding:—Held, (Galt, J., dissenting) that there was no merger of the

mortgage debt, but the defendant still remained liable therefor, the equity of redemption having been released only to enable the plaintiffs more conveniently to sell. Per Wilson, C. J. The accountability for the surplus of the proceeds of the sale, shewed the true nature of the transaction. Per Osler, J. The merger of the mortgage was a question of intention, such intention being a matter of fact. Per Galt, J. When the plaintiffs accepted from defendant a release of his equity of redemption without any reference to or mention of the mortgage debt, they thereby discharged the defendant and the charge became merged. *North of Scotland Mortgage Co. v. German*, 31 C. P. 349.

The owner of lands created two mortgages thereon, and subsequently released his equity to the mortgagee who was entitled to priority, who afterwards bought the interest of the mortgagor at sheriff's sale, and subsequently sold the premises to several purchasers, who bought without notice of the second mortgage:—Held, that this had not the effect of merging the mortgagee's charge in the equity of redemption; and that in a proceeding by parties claiming under the second mortgage, their only right was to redeem as puisne incumbrancers, and that the purchasers were entitled to an enquiry as to the enhanced value of the property by reason of their improvements. *Weaver v. Vandusen—Wills v. Agerman*, 27 Chy. 477.

3. Discharge and Certificate.

A certificate of discharge of mortgage is of no effect to revest the legal estate until registered. Where a certificate of discharge was lost before registration:—Held, that the disclaimer of the mortgagees, who were trustees, and the consent of their solicitors was not sufficient to enable the Court to declare the petitioner entitled to the legal estate in fee simple. *Re Moore*, 8 P. R. 471.—Proudfoot.

A mortgagor or other party entitled to the equity of redemption has a right to obtain at his own expense from the mortgagee a reconveyance of the mortgage premises, including a covenant against incumbrances. He is not obliged to accept the simple discharge of mortgage prescribed by the statute. *McLennan v. McLean*, 27 Chy. 54.

The purchaser of a mortgaged estate paid the amount due on the mortgage to the mortgagee, who executed a statutory discharge of the incumbrance, which recited that the money due upon the mortgage had been paid by the mortgagor, and refused either to sign a discharge stating correctly the name of the plaintiff as the person paying, or to execute a reconveyance in his favour, the plaintiff offering to furnish satisfactory proof, if desired, that he was the owner of the equity of redemption. The court, on a bill filed for that purpose, ordered the mortgagee to execute the reconveyance, and pay the costs of the suit. *Id.*

A mortgagee executed a statutory discharge which was incorrectly dated, and his agent in good faith and in order to make the instrument conform to the intention of the mortgagee altered the date, which alteration was, under the circumstances, immaterial, and, as altered, the document stated correctly what was intended by

the parties to it. Under these circumstances a bill impeaching the validity of such discharge was dismissed, with costs. *Sayles v. Brown*, 28 Chy. 10.

The registration of a certificate given by the survivor of several mortgages, upon payment in money of the mortgage debt, effectually discharges the mortgage, and revests the legal estate. C. executed two mortgages in favour of M. B. and her two sisters, for moneys advanced by them, which were duly registered. He afterwards sold portions of the land to D. and E., giving them his covenant against incumbrances. Subsequently, and after the death of the two sisters, C. procured M. B. to execute discharges of these mortgages, giving her instead a mortgage on the other lands of ample value, by way of security, and after the registration of these discharges he sold the rest of the land comprised in the original mortgages to others. These purchasers took in good faith for value, having no actual notice of the two original mortgages. C. afterwards induced M. B. to accept in lieu of this mortgage which she discharged, a mortgage upon other lands which proved almost worthless. Upon the death of M. B., the personal representatives of herself and sisters filed a bill seeking to charge the land embraced in the original mortgages with the amount remaining due thereon:—Held, reversing the decree of Blake, V. C., (26 Chy. 99,) that the discharges by M. B. were valid and effectual, so far as the purchasers, after they had been registered, were concerned, as when they received their conveyances and paid the consideration therefor, a discharge by M. B., the person entitled by law to receive the money was registered, and they were not bound to enquire whether payment in money had been actually made; but that the discharges were inoperative in favour of C. and D. and E., who purchased from him with notice of the mortgage by reason of the registry, to extinguish the interest of the deceased sisters other than M. B., as she could only discharge the mortgages upon payment of the debt, and not by the acceptance of another security. *Dilke v. Douglas et al*, 5 A. R. 63.

Although under R. S. O. c. 100, s. 9, a mortgage in fee simple by a tenant in tail vests the fee simple in the mortgagee, the registration of a discharge of such mortgage, in accordance with R. S. O. c. 111, s. 67, does not reconvey the estate to the tenant in tail barred of the entail; it operates only as a reconveyance of the original estate of the mortgagor. *Lawlor v. Lawlor, et al*, 6 A. R. 312. Reversed by the Supreme Court.

See *Trust and Loan Company v. Gallagher*, 8 P. R. 97. p. 463.

IV. RIGHTS AND LIABILITIES OF PARTIES AND THOSE CLAIMING UNDER THEM.

1. Mortgagee in Possession.

As between mortgagor and mortgagee, there is nothing to prevent the mortgagee taking possession at a fair and reasonable rent agreed upon between them. In such a case the mortgagee is not a "mortgagee in possession" in the technical sense of the term. In such a case, however, a subsequent incumbrancer—prior to the first mortgagee, entering into possession—is not bound by such an arrangement; and the master may charge

the first mortgagee with a fair occupation rent although it exceeds that stipulated for. *Court v. Holland*, 29 Chy. 19.

See *Cronn v. Chamberlin*, 27 Chy. 551, p. 265.

2. Right of Mortgagee to Maintain Actions.

Although a mortgagee has no right to complain of any subsequent dealing with the estate by the mortgagor, there is nothing to prevent him, if his claim is left unsatisfied from suing on the covenant in the mortgage, and proceeding to a sale under execution or applying to this court to remove any subsequent fraudulent conveyance which interferes with the realization of his claim. *Parr v. Montgomery*, 27 Chy. 521.

Quære whether the appellant whose only interest was that of mortgagee of S's interest, had any locus standi to bring a suit for partition or to appeal without his co-plaintiff. *Laplane v. Scamen, et al.*, 8 A. R. 557.

3. Rights and Liabilities of Purchasers of Equity Redemption.

When a mortgagor who has covenanted for payment of the mortgage debt, sells his equity of redemption subject to such mortgage, he becomes surety of the purchaser for the payment of such debt, and if the same is allowed to run into default he will be entitled to call upon his assignee to pay such debt. *Campbell v. Robinson*, 27 Chy. 634.

G., the owner of real estate executed a mortgage to the plaintiff, and subsequently created a second mortgage in favour of one H., which he transferred to the plaintiff. Afterwards G. mortgaged the same lands to R. and D.; and subsequently assigned the equity of redemption to them, in which assignment the mortgage to the plaintiff and that to R. and D. were recited, but the intermediate one to H. was not, though the amount stated as due to the plaintiff was about the sum secured by both mortgages held by him. Default having been made, a bill was filed against G. upon his covenants and against his assignees R. and D., as the owners of the equity of redemption and entitled to redeem:—Held, that under these circumstances G. having claimed such relief by his answer, was entitled as against his co-defendants to an order for them to pay such sum as might be found due the plaintiff under his securities, and the suit having been rendered necessary by reason of the default of R. and D. in not paying the plaintiff, they were also bound to pay G. his costs. *Id.*

B. owned lots D and E, and mortgaged them. The mortgagee (J.) assigned the security and afterwards bought up the equity of redemption. P. the plaintiff, subsequently purchased lot D, for which he paid the full value and obtained a conveyance containing statutory covenants for title and possession. J. subsequently sold lot E. to a bona fide purchaser, who conveyed to the appellant:—Held, affirming the judgment of the court below (28 Chy. 356), that P. was entitled to be indemnified out of lot E. to the full extent of the value thereof against the amount due on the mortgage. *Pierce v. Canavan et al.*, 7 A. R. 187.

See *Chamberlain v. Sovais*, 28 Chy. 404, p. 469.

4. Recovery of the Mortgage Money.

(a) When an Action will lie.

Held, that a mortgage which contains an acknowledgment of receipt of the mortgage money, but no covenant for repayment of money, does not of itself afford conclusive evidence of a debt, so that the mortgagee or his assigns can maintain an action for its recovery. In this case it was shewn that no money was ever advanced by the mortgagee to defendant, the mortgagor, but that the mortgage was given for a debt due by defendant to one C., who in consideration of getting it agreed to relieve defendant from all personal liability; and the plaintiffs, assignees of the mortgage, were held not entitled to recover. *Quære*, whether sec. 1, sub-s. 4, and sec. 2 of the Vendors and Purchasers' Act, R. S. O. c. 109, apply to such an action as this, or only to actions where the title to land is in question. *The London Loan Co. v. Smyth*, 32 C. P. 530.

A writ was in the hands of the sheriff at the suit of the plaintiffs against I., at the time of the dismissal of a bill filed by I. to redeem the plaintiffs, and at the time of the sale to M., which dismissal had the effect of a decree of foreclosure against I.:—Held, notwithstanding that the plaintiffs might proceed to recover their debt against I., they being in a position to reconvey the mortgaged premises. *Bank of Toronto v. Irwin*, 28 Chy. 397.

(b) Interest.

A mortgage was to be void on payment of \$2,000, at eight per cent., in five years from date thereof, with "interest in meantime half-yearly on, &c., in each and every year of said term of five years; and also upon payment of interest at and after the rate aforesaid upon all such interest money as shall be permitted or suffered to be in arrear and unpaid after any of those days and times hereinbefore limited and appointed for payment thereof":—Held, that the contract between the parties was simply one for payment of interest on any interest which might be in arrear before, but not after, the expiry of the mortgage. *Wilson v. Campbell*, 8 P. R. 154.—Blake.

Interest on a mortgage was payable half-yearly in advance on the 1st of April and October. The mortgagee filed a bill for sale, and the Registrar on taking the account (in the latter part of January) fixed a day in July following for payment, and allowed the plaintiff interest to that date, but refused to allow him the half year's interest payable in advance on the 1st of April. *Trust and Loan Co. v. Kirk*, 8 P. R. 203.—Holmstead, Registrar.—Proudfoot.

Where no rate of interest is fixed by a mortgage to be paid after maturity, the rate of interest mentioned in the mortgage is chargeable *prima facie*, but the person seeking to reduce it may shew that it is more than the ordinary value of money. *Simonton v. Graham*, 8 P. R. 495.—Blake.

Where no interest is reserved by a mortgage none is recoverable until after the day appointed for payment of the principal. *Reid v. Wilson*, 9 P. R. 166.—Holmstead, Registrar.

Quære, as to the effect of a proviso in a mortgage for payment of the amount "secured without interest if paid when due." *Ib.*

Where a mortgage to secure the re-payment of money with interest at 10 per cent. provided that, "should default be made in payment of the principal money or interest, or any part thereof respectively then the amount so overdue and unpaid to bear interest at the rate of 20 per cent. per annum until paid":—Held the said proviso was not invalid, or relievable against on the ground of forfeiture. *Downey v. Parnell*, 2 O. R., Chy. D. 82.

A parol agreement to pay a higher rate of interest than that reserved in the mortgage, is ineffectual to charge the land. *Totten v. Watson*, 17 Chy. 235, and *Matson v. Swift*, 5 Jur. 645, followed. *Re Houston—Houston v. Houston*, 2 O. R., Chy. D. 84.

5. Right to Growing Crops.

Upon default made in payment of a mortgage the mortgagee has the unquestionable right to take possession of the property in the state in which it then is as to crops, and to hold the whole as his security. Therefore, when land was sold in July under a decree made in a mortgage suit, without any reservation of crops:—Held, that the purchaser took all that the mortgagee could beneficially hold possession of, and was entitled to the unsecured growing crops, mature and immature. *McDowell v. Phippen*, 1 O. R., Chy. D. 143.

6. Mortgagee purchasing at Sale of Mortgaged Premises.

P. created three several mortgages on separate portions of his estate, in all about 140 acres, estimated as worth \$6,000, subject to incumbrances amounting to \$3,500, and interest. One of the mortgages was in favour of defendant M., who subsequently acquired the interests of the other two mortgagees. After the creation of these mortgages P. executed a deed of trust of the whole property in order to defeat a claim of title set up to ten acres by one S. Default was made in payment of M.'s mortgage, who instituted proceedings at law and recovered judgment, on which he sued out execution and under it the sheriff (after the defendant M. had so acquired the other mortgages) proceeded to a sale of the property, which he offered in three distinct parcels, and M. bid for and became the purchaser of all at sums amounting in the whole to \$20. The cestui que trust thereupon filed a bill to redeem, alleging that the sale to M. had been at a gross undervalue, and praying to have the same set aside; the court however refused the relief asked with costs, being of opinion that the deed of trust was fraudulent, and that the price realized was large considering that it was a sheriff's sale. *Parr v. Montgomery*, 27 Chy. 521.

See also *Ricker v. Ricker*, 7 A. R. 282.

7. Sale of Equity of Redemption under Execution.

See *Parr v. Montgomery*, 27 Chy. 521, *supra*.

V. ASSIGNMENT AND TRANSFER.

The plaintiffs the Trust and Loan Company, advanced \$2,000 on certain land, on condition

that three encumbrances against it should be discharged out of the proceeds of their loan and otherwise. The first and third encumbrancers were paid off, and the former executed a statutory discharge of their mortgage, which was never registered. Subsequently the second encumbrancer, who had not been paid, claimed priority over the plaintiffs. They then obtained an assignment of the first mortgage:—Held, that the discharge of mortgage not having been registered, operated only as a receipt, and the amount paid the first encumbrancer being paid by the Trust and Loan Co., and not by the original mortgagor, that the plaintiffs were entitled to priority to the extent of the first mortgage. *Trust and Loan Co. v. Gallagher*, 8 P. R. 97.—Taylor, Master.

Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor, the latter is bound to use due diligence in enforcing payment thereof; and if through his default or laches the money secured thereby is lost, it will be charged against the creditor, and deducted from his demand. *Synod v. DeBlaguere*, 27 Chy. 536. (Affirmed on Appeal, 30th June, 1880.)

A mortgagor paid off a mortgage after the mortgagee had assigned it, and also a second mortgage obtained by fraud from the same mortgagor to the plaintiffs, who did not procure the mortgagor to join in the assignment of either, or notify him thereof:—Held, that the assignee took the mortgages subject to the equities between the original parties thereto; and as the original mortgagee could not, if plaintiff, have recovered upon the one mortgage because paid, nor upon the other, because invalid, so neither could his assignee. *Wilson v. Kyle*, 28 Chy. 104.

The original owner of land created a mortgage thereon in favour of one M. and died without redeeming, and the equity of redemption in the premises descended to C. F. his heir-at-law, who with her husband P. F. joined in a conveyance thereof to trustees charged with the support and maintenance of the plaintiffs, subject to which and the mortgage in favour of M. the premises were limited to P. F. in fee, who subsequently in September, 1875, out of W. F.'s moneys paid the amount due on M.'s mortgage, but which was not actually discharged. In December following P. F. sold to W. F., conveyed to him the equity of redemption and procured M. to assign his mortgage and convey to him the legal estate. In March, 1877, W. F. mortgaged the land to a loan company but did not assign the M. mortgage, and subsequently the plaintiffs filed a bill seeking to have the charge for their maintenance enforced against the mortgage estate:—Held, (reversing the finding of the Master at Hamilton) that the loan company were, under the circumstances, entitled to priority over the plaintiffs to the extent of the amount secured by M.'s mortgage. *Fraser v. Gunn*, 29 Chy. 13.

A mortgagor and mortgagee dealt together for some years without having had any settlement of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off, in favour of the mortgagor for the balance due him on their general dealings:—Held, affirming the finding of the master, that

such a right of set-off passed to the official assignee of the mortgagor, and that a transferee of the security took it subject to the equity. *Court v. Holland*, 29 Chy. 19.

The plaintiffs negotiated for the purchase from the defendants of certain mortgage securities and other assets of the defendants on the basis of an eight per cent. investment, and a schedule was prepared by the defendants' manager exhibiting each security, amongst which there was stated to be a mortgage by F. for \$4,700; whereas in fact there was no such mortgage, but instead two mortgages on the instalment principle, which as an eight per cent. investment were worth only \$3,920, making a deficiency of \$780. This was caused by F. before the schedule was drawn up, intimating his intention of paying off the mortgages, \$4,700, being the amount agreed upon between F. and defendants, which he would have to pay and which defendants' manager therefore, in good faith, put into the schedule. Subsequently and while the schedule was in the plaintiffs' solicitor's hands to prepare and settle the deed of assignment, F. decided not to pay off the mortgages, but to go on with the regular payment of same, and defendants' manager then corrected the schedule by inserting the two mortgages. There was a difference between the plaintiffs and defendants as to the value of the securities, and finally a lump sum was agreed on and paid by plaintiffs, and the assignment executed:—Held, by Osler, J., that, on the evidence, set out in the report, the plaintiffs' solicitor must be deemed to have had notice of the error and alteration in the schedule before the execution of the conveyance or completion of the transaction, and that this was notice to the plaintiffs:—Semble, per Osler, J., that, although the evidence shewed that there was no intention to deceive on the part of the defendants' manager, still there was such a misstatement of a material fact, as, but for the notice would render the defendants liable for the damage sustained thereby. *The Real Estate Investment Company v. The Metropolitan Building Society*, 3 O. R., C. P. D. 476.

The defendants in the deed of assignment covenanted that the mortgages were good and valid charges on the lands, and that the defendants had not done or permitted any act, &c., whereby the mortgages had become released or discharged in part or in entirety. It appeared that certain of the lands comprised in these mortgages had been sold for taxes:—Held, per Osler, J., that the covenant was not ultra vires of the company or the directors; and that the plaintiffs were entitled thereunder to recover the value of the lands so sold. *Id.*

Arrears of taxes due on the mortgaged lands were paid by the plaintiffs. The taxes were due by the mortgagors; there was no covenant in the assignment against incumbrances, and no evidence of any request by defendants to pay them:—Held, that the plaintiffs were not entitled to recover the amounts so paid. *Id.*

The plaintiffs also claimed to recover a sum of money paid to the defendants' solicitors for costs due them:—Held, under the circumstances not recoverable, as it was a voluntary payment. *Id.*

On appeal to the Divisional Court:—Held, as to the claim for the \$780, there could be no recovery, for that the true construction of the transaction was that the lump sum was to cover all deficiencies in value as also errors and mistakes, at all events to not an unreasonable amount, which \$780 could not be said to be; and where, as here, there was no fraud, concealment, or misrepresentation. In other respects the judgment was affirmed. *Ib.*

VI. SEVERAL MORTGAGES.

1. Priority.

There were two mortgages registered against property, the first mortgagees were pressing the mortgagor for payment, and about to sell out his chattels, and A. at the request of the mortgagor, and to stop such sale, advanced \$1,000 to them, and took a mortgage to secure himself from the mortgagor, but with no understanding with the first encumbrancers:—Held, that A., though he thus reduced the first mortgage by \$1,000, and so bettered the position of the second mortgagee by that amount, could not claim priority for his advance over the second mortgagee. *Imperial Loan and Investment Co. v. O'Sullivan*, 8 P. R. 162.—Spragge.

C. being the equitable owner of the land contracted by writing (registered) to sell to the defendant on 13th of February, 1877. Part of the purchase money was paid down. C. obtained an order on 17th April, 1878, vesting the land in him—there were two mortgages on the registry prior to one in favour of the loan company. On the 17th May the defendant gave an order on the loan company to pay the proceeds of a loan to their local agent, who was informed by one J., a solicitor who had control of the two prior mortgages, that they were paid off and that he would get them discharged. Thereupon the agent paid C. the balance of his unpaid purchase money, and C. on the 25th May, 1878, conveyed to the defendant. The loan company's mortgage was dated 15th May, and registered the 25th May:—Held, on appeal from the master (affirming his report) that the loan company could not stand in C.'s place and claim priority in respect of his lien for unpaid purchase money over the prior mortgages, following *Imperial L. & I. Co. v. O'Sullivan*, 8 P. R. 162. *Watson v. Dowser*, 28 Chy. 478.

The loan company's mortgage contained this clause, "that in the event of the money hereby advanced, or any part thereof, being applied to the payment of any charge or incumbrance, the company shall stand in the position and be entitled to all the equities of the person or persons so paid off":—Held, that this provision could not affect prior mortgagees who were no parties to it; and Quære, whether it would apply to the discharge of unpaid purchase money, which does not constitute a charge or incumbrance in the proper meaning of those terms. *Ib.*

See *Fraser v. Gunn*, 29 Chy. 13, p. 463; *Trust and Loan Co. v. Gallagher*, 8 P. R. 97, p. 463.

2. Consolidation.

The rule that a mortgagee shall not be redeemed in respect of one mortgage, without being

redeemed also as to another mortgage created by the same mortgagor, applies as well in a suit to foreclose as to redeem. In such a case the property embraced in one mortgage realized more than sufficient to discharge it. The plaintiff, an execution creditor of the mortgagor, obtained a security on the lands comprised in such mortgage which was registered after it, but without notice thereof. On a sale of the lands embraced in another mortgage a loss was sustained by the mortgagee:—Held, (1) that the defendant, the mortgagee, had not the right as against the plaintiff, to consolidate his mortgages, and make good the loss on the one out of the surplus on the other sale, the policy of the Registry Act being to give no effect to hidden equities. (2) That by taking a mortgage, and thus giving time to the mortgagor, the plaintiff was a holder of his mortgage for value. *Johnston v. Reid*, 29 Chy. 293.

See also *Miller v. Brown*, 3 O. R. 210.

3. Other Cases.

Several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs with the usual mortgagor's covenants. He afterwards conveyed another parcel to S., who, when he took his conveyance, was not aware of the plaintiffs' mortgage, but it was registered against the parcels embraced in it, though not against the other parcels:—Held, (1) That the plaintiffs were entitled to require as between them and S. that the parcel conveyed to the latter should be resorted to for satisfaction of the prior mortgage before recourse should be had to the parcels embraced in the plaintiffs' mortgage. (2) That the registration of the prior mortgage against the parcel bought by S. was notice to him of the right of persons who purchased other parcels before he purchased to throw the mortgage upon his parcel, and that S. was affected with notice of the plaintiffs' mortgage, and the right it conferred. *Clark v. Bogart*, 27 Chy. 450.

The first of three mortgagees having filed a bill for sale, the other two proved their claims in the suit. No one redeemed by the day appointed, but a final order for sale was not taken out, because one V., who had purchased the equity of redemption, was negotiating with S., the third mortgagee. During these negotiations V. cut and sold a large quantity of the timber on the land to G., whereupon S. filed a bill praying payment by G., of the price of the timber, which had not yet been paid over:—Held, affirming the Master's ruling, that the first mortgagee was entitled to it. *Scott v. Vosburg*, 8 P. R. 335.—Proudfoot.

On 4th April, 1853, M. and his wife (to bar dower) mortgaged the lands in question to C. On 21st May, 1857, M., being in insolvent circumstances, conveyed the said lands to W. to the use of M.'s wife. In 1853, and 1872 M. executed two other mortgages to C. for the debt originally secured by the first mortgage. On 20th December, 1874, M. and his wife (to bar dower) mortgaged the said lands, to C. All the above deeds were registered about the time of their respective executions. On 6th March, 1876, G. assigned to the plaintiff, but the deed was not registered. On 7th June, 1876, M. and his wife jointly mortgaged the same lands to the plaintiff by deed registered 15th July, 1876. On 21st

May, 1874, W. and M. and his wife granted and released the said lands to C. until payment of the mortgage of 1872, and on payment thereof to the use of M. in fee. This, however, was not registered till 4th August, 1881. The plaintiff had no notice that the conveyance from M. of 21st May, 1867, was invalid, nor of the conveyance of 21st May, 1874, but he had notice of the three mortgages to C. and that C. claimed the whole debt against the land, and also that there was a defect in C.'s title under the second and third mortgages:—Held, that the plaintiff, being bound by such notice, could not avail himself of any defect in the title arising from M. executing the latter two mortgages to C., although still being the owner of the equity of redemption, that the plaintiff acquired his title with knowledge that C. claimed a debt represented by the three mortgages, and took his mortgage, subject to such claim by C.:—Held, also, that the deed from M. of 21st May, 1867, was either voluntary or a fraudulent preference, and in either case void; and that the fact that M.'s wife joined to bar dower, in the two last mortgages to C. after she had apparently become the owner of the equity of redemption, constituted her a party to the accounting which took place with C. in respect to the continuing debt, and bound her in her character of assignee of the equity of redemption if she could be so considered. *Edwards v. Morrison et al.*, 3 O. R., Chy. D. 428.

See *Gzowski v. Beatty et al.*, 8 P. R. 146, p. 473.

VII. SALE UNDER POWER OF SALE.

1. Notice.

A power of sale in a mortgage required notice upon default to be given to the mortgagor, "his heirs, executors, or administrators," or left for him or them at his or their last or usual place of abode, before exercising the power:—Held, that a notice which was served upon the widow, who was also the administratrix of the deceased mortgagor, and addressed to her as such widow, was insufficient, because not served also upon the heir-at-law of the mortgagor, although only an infant about three years of age, and that the sale under the power was therefore void. *Bartlett v. Jull*, 28 Chy. 140.

The notice stated only that unless payment was made proceedings would be instituted to obtain possession:—Held, also, that on this ground the notice was insufficient to support a sale. *Ib.*

In proceeding to impeach a conveyance executed in pursuance of such a sale the purchaser, or those claiming under him, must shew a due exercise of the power of sale; the onus of impeaching it is not upon the party alleging the invalidity of the deed. *Ib.*

One of the stipulations of a mortgage was, that "interest should be payable half yearly on * * * Provided that the mortgagees, on default of payment for three months, may enter on and lease or sell the said lands without notice: "And the mortgagees covenant with the mortgagors that no sale or lease of the said lands shall be made or granted by them until such time as one month's notice in writing shall have been given to the mortgagors." Held (per Proudfoot, V. C.), that the mortgagees could sell at any time, without

notice, after default for three months, and that the purchaser would take a good title; and in any event, a notice served at any time after default was sufficient, and the mortgagees were not bound to wait until default had been made for three months to give such notice: in other words, that the month's notice and the three months' default might be concurrent. *Grant v. Canada Life Ass. Co.*, 29 Chy. 256.

The rule of law which requires a mortgagee selling under a power of sale in his mortgage to observe the terms of such power, is also applicable to sales by a trustee or quasi trustee acting under a power;—the power must be followed; and the rule applies with equal force to sales by an assignee of an insolvent estate, under the Act of 1869, sec. 47, who in such cases acts under a statutory power authorizing a sale, "but only after advertisement thereof for a period of two months." An assignee proceeded to sell the lands of the insolvent without giving notice of such intended sale "for a period of two months" as prescribed by the Act, no sanction of the creditors thereto having been given:—Held, a good objection to the title by a vendee of the purchaser at such sale. *In re Jarvis v. Cook*, 29 Chy. 303.

2. Costs.

The costs of proceedings to obtain a sale of mortgaged premises are such a charge upon the estate as will entitle the mortgagee to proceed to a sale of the property in the event of non-payment. *Thompson v. Holman*, 28 Chy. 35.

Where a first mortgagee sells under the power of sale contained in his mortgage, a subsequent mortgagee is entitled to an order to tax the first mortgagee's costs of exercising the power of sale, such costs to be taxed as between solicitor and client. *Re Crerar and Muir*, 8 P. R. 56.—Dalton, Q. C.

First mortgagees sold under a power in their mortgage, and paid their solicitors' costs of sale. A subsequent encumbrancer obtained from the referee, on motion, an order for the taxation of the mortgagees' costs. This order was reversed on appeal, on the ground that the mortgagees could not tax the bill, and the mortgagor stood in their place. An objection that the order should have been obtained on petition, not notice, was disregarded. *Re McDonald, McDonald & Marsh*, 8 P. R. 88.—Stephens, Referee.—Proudfoot.

First mortgagees sold under power of sale, and paid their attorneys' costs. A second mortgagee was held not to be entitled to the right of taxing these costs. *Re McDonald, McDonald & Marsh*, 8 P. R. 88, approved. *Re Cronyn, Kew & Betts Attorneys*, 8 P. R. 372.—Full court.

Where F., a solicitor, on behalf of his client, served a notice of sale under a mortgage made pursuant to the Act respecting short forms, R. S. O., c. 104, upon what he believed, after diligent enquiry, was the last place of residence of the mortgagor in this province, and did so on the instructions of his client, who was fully advised as to the said enquiries and their result, and bona fide deeming such service sufficient:—Held, that F. was entitled, as against his client, to tax the costs of the proceedings under the power of sale, although it appeared the mort-

gagor really was at the time of such service, within this province. R. S. O. c. 104, permits substitutional service at the residence, though the mortgagor may be within the jurisdiction. But even if such is not the proper construction of the statute, it is a matter so doubtful that the solicitor who bona fide acted on that view of the statute should not lose his costs of so effecting service. *O'Donohoe v. Whitty*, 2 O. R., Chy. D. 424.

3. Other Cases.

In a bill filed by a mortgagor against his son, a bidder at the sale by another of the defendants, a loan company, to which bill the company and one B. were also defendants, it was alleged that it had been agreed between the son and B. that in consideration of the son's securing to B. a debt of the plaintiff, B. would advance the deposit necessary to enable the son to buy the land at the sale; that the son should attend and buy in the land, which he accordingly did; that in consequence of B.'s refusal to make the promised advance, the son was unable to carry out the sale; that the bidding of the son deterred others present from bidding, and that B. afterwards privately bought the land at a great undervalue to the loss of the plaintiff.—Held, on demurrer, that the bill sufficiently, though inartificially, alleged that by reason of B.'s agreement and refusal to make the advance agreed upon, he had occasioned an abortive sale, and profited thereby to the loss and damage of the plaintiff. *Campion v. Brackenridge*, 28 Chy. 201.

Quære, whether the claim of a second mortgagee for the surplus proceeds of the sale after satisfaction of the prior mortgage is a purely money demand. *Green v. Hamilton Provident Loan Co.*, 31 C. P. 574.

VIII. REDEMPTION OF MORTGAGES.

1. Who entitled to Redeem.

Four persons joined in executing a mortgage of their joint estate, and subsequently the interest of three of them was sold under executions at law:—Held, that the sale was inoperative; that the owner of the equity of redemption had a right to redeem; and that the purchaser at sheriff's sale, who was also the mortgagee, having gone into possession of the mortgage estate, was bound to account for the rents and profits. *Cronn v. Chamberlin*, 27 Chy. 551.

In a suit to redeem, the plaintiff was a judgment creditor with execution in the hands of the sheriff against the lands of the defendant S., which lands were subject to a mortgage to L., whose executors were also defendants. At the hearing the court (Spragge, C.) declared the plaintiff entitled to the same relief as upon a bill by a puisne incumbrancer against a prior mortgagee and the mortgagor, and that notwithstanding R. S. O. c. 49, s. 5, inasmuch as he could not establish his right in the county court in which he had recovered his judgment, so as to obtain as effectual a remedy as that sought in the redemption suit, he might resort to equity to obtain relief. *Chamberlin v. Sovais*, 28 Chy. 404.

The executors of B. were also liable upon the judgment recovered by the plaintiff, B. having been a defendant in the action, and by their

answer set up that they were liable only as sureties for the defendant S. All parties interested were represented in the suit, and no one objecting thereto, a reference was granted at the instance of B.'s executors, in order that they might establish the fact of suretyship, in which case they would be entitled to the same relief as was granted in *Campbell v. Robinson*, 27 Chy. 634. *Id.*

One of the mortgagor's surviving children died an infant and intestate before this suit:—Held, that this suit, which was for redemption, enured to the benefit of those entitled to her share, including her mother as tenant for life under R. S. O. c. 105, s. 27:—Held, also, the mother should be directed to be made a party in the master's office under G. O. 438, since the present case did not fall under the Judicature Act. Semble, if under that Act the same might have been directed under Rule 89. *Faulds v. Harper et al.*, 2 O. R., Chy. D. 405. Reversed on appeal. See 9 A. R. 537.

See also *Re Davis*, 27 Chy. 199.

2. Terms of Redemption.

The equity of redemption is an entire whole, and so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures for the benefit of all, and the mortgagee must submit to redemption as to the whole mortgage. *Faulds v. Harper et al.*, 2 O. R., Chy. D. 405. Reversed, on appeal. See 9 A. R. 537.

3. Costs.

In proceeding under a consent decree to redeem, the defendant being in the position of a mortgagee brought in an account claiming \$905 to be due, while the master found the balance to be only \$1.32:—Held, that as the defendant had advanced his claim honestly, and under a reasonable belief that the sum claimed was justly due, he was entitled, notwithstanding the insignificant sum remaining unpaid, to the benefit of the rule that a mortgagor coming to redeem is liable for the costs of suit where a balance is found in favour of the defendant. *Little v. Brunker*, 28 Chy. 191.

See *Livingston v. Wood*, 27 Chy. 515, p. 159.

IX. FORECLOSURE.

2. Parties.

(a) Creditors.

Where sureties for a debt gave to the creditor a second mortgage on land as an additional security, and foreclosure proceedings are taken by the first mortgagee:—Held, that the creditor, on being notified thereof, should either make himself a party to the suit and prove his claim, or notify the sureties to enable them to prove it if they so desired; but:—Held, that the evidence in this case shewed that the sureties had notice, at all events some three months before the day of redemption, which was sufficient. Held, also, that the fact of two co-debtors changing their position so as to make one of them as between themselves a surety, would not affect the creditor without his consent. *Jones v. Dunbar et al.*, 32 C. P. 136.

(b) *Wife.*

Where the wife of a mortgagor is a party to and bars her dower by the mortgage, she is not improperly made a party defendant to a bill for foreclosure under the mortgage since the coming into force of 42 Vict. c. 22. *Building and Loan Association v. Carswell*, 8 P. R. 73.—Spragge.

(c) *Adding Parties.*

In a foreclosure suit, after final judgment, an order was obtained ex parte adding two parties as defendants, who had pendent lite and before judgment become interested in the equity of redemption, and directing that they be bound by the judgment unless, within fourteen days, they should move against the order. On application by the added defendants this order was rescinded; and—Held, that they should not have been made parties after judgment. *Abell v. Parr*, 9 P. R. 564.—Dalton, *Master*.

3. *Final Order and Decree.*

This suit became abated between the date of the report and the time fixed by it for payment by subsequent encumbrancers. On an application for a final order for foreclosure, it was refused, and a new day was appointed, allowing the encumbrancers an additional time for payment, equal to the time the suit remained abated. *Biggar v. Way*, 8 P. R. 158.—Blake.

A final order of foreclosure should reserve a day for infant defendants to shew cause. Spragge C., was of opinion that the practice should be changed for the sake of putting an end to litigation, and to the evil of having estates tied up for perhaps many years, but refused to change the practice in the present case. *London and Canadian Loan and Agency Co. v. Everitt*, 8 P. R. 489.

4. *Opening Foreclosure.*

Where after foreclosure, the rights of purchasers have intervened, any equitable claim which the mortgagor may have previously had to open the foreclosure, is, in this country at all events, to be considered forfeited. *Campbell v. Holyland*, L. R. 7 Ch. D. 173 remarked upon, and *Platt v. Ashbridge*, 12 Chy. 105 followed. *Trinity College v. Hill et al*, 2 O.R., Chy. D. 348. Reversed on appeal.

On a motion to open a foreclosure, the debt and costs amounted to about \$3,000, and the property was worth \$7,000. The Master under the circumstances set out in the report refused the motion, the plaintiff having been forbearing, and the defendant negligent throughout. *Miles v. Cameron*, 9 P. R. 202.—Dalton, *Master*.

See *Johnston v. Johnston*, 9 P. R. 259, p. 472.

5. *Other Cases.*

Where a defendant by bill in a foreclosure suit demanded a sale and paid \$80 into court as a deposit:—Held, that although the costs of the sale would exceed that amount, the defendant could not be ordered to increase it, the amount being fixed by schedule S endorsed on the office copy of the bill under Order 436. *Cruso v. Close*, 8 P. R. 33.—Taylor, *Referee*.—Proudfoot.

In an action of foreclosure upon a mortgage which contains a clause by which the principal falls due upon default made in payment of any instalment of interest, if the plaintiff claims the benefit of the clause, and calls in the whole mortgage debt, he is bound by his election and must accept principal, interest, and costs, whenever tendered, although he does not pray for a personal order for immediate payment. *Drummond v. Guickard*, cited in *Green v. Adams*, 1 O. Chy. Chamb. 124, overruled. *Cruso v. Bond*, 1 O. R., Chy. D., 384; reversing *S. C.*, 9 P. R. 111.

An action for foreclosure of a mortgage is governed by Rule 78 and no order allowing service is necessary and on default of appearance judgment may be entered on praecipe according to the former practice in chancery. *Chamberlain v. Armstrong*, 9 P. R. 212.—Boyd.

The decree declared that the defendant was a trustee of the premises in question for the plaintiff, and that the plaintiff was entitled to redeem on payment of what the master should find due, within six months after report, &c., and in default of payment, the plaintiff was to be foreclosed. The report was dated 4th March, 1882, and appointed 18th April, 1882, for payment. The money was paid into the Bank of Commerce on that day, but by mistake to the credit of a suit of *Johnston v. A. Johnston*. On the 22nd April, 1882, the defendant's solicitor, on the usual affidavit of non-payment and certificate of bank manager, obtained an order ex parte dismissing the bill with costs. On the 25th April, the defendant's solicitor became aware that the money had been paid in to the credit of the wrong suit, but on the 20th April, he had been aware that the money was paid, though not aware of the exact nature of the mistake. On the 27th April, the defendant sold the premises:—Held, that the defendant must be considered identified with his solicitor as to all the information the solicitor had: that the order made dismissing the bill, instead of foreclosing the plaintiff, and also the master's report giving six weeks instead of six months for payment as required by the decree, were irregularities, sufficient to notify the purchaser of something unusual in the proceedings, and therefore that he could not rely on the final order dismissing the bill alone: that even if the order had been for foreclosure, under the facts of this case, it would be a proper exercise of the discretion of the court to open it up; and that a suit commenced by the plaintiff to set aside the sale, did not estop him from obtaining relief under the motion. *Gunn v. Doble*, 15 Chy. 655, distinguished. *Johnston v. Johnston*, 9 P. R. 259.—Dalton, *Master*.—Proudfoot.

On motion ex parte for a direction to the Registrar to insert in a praecipe judgment of foreclosure in a mortgage suit, an order for immediate payment of the amount due by the defendant, under his covenant, up to judgment, (the Registrar to take the account,) where a reference to the Master as to subsequent encumbrances was also sought:—Held, that the usual course must be followed, and that the defendant should be ordered to pay the amount found due forthwith after the Master shall have made his report. *North of Scotland Canadian Mortgage Co. v. Beard*, 9 P. R. 546.—Boyd.

See *Gzowski v. Beatty et al.*, 8 P. R. 146, p. 473.

X. SALE.

1. *When it will be Directed.*

Although by the general rule and course of proceeding in mortgage cases the mortgagor is entitled to six months to redeem, before a sale is ordered, the Court will, under special circumstances, direct an immediate sale of the property, even as against the infant heirs of the mortgagor. *Swift v. Minter*, 27 Chy. 217.

See *Western Canada Loan and Savings Co. v. Dunn*, 9 P. R. 587, p. 230.

2. *Parties.*

A mortgagee filed a bill for sale making certain lien holders under the Act parties defendants, therein alleging that the work, by virtue of which their liens arose, was commenced after the registration of his mortgage:—Held that the lien holders should have been made parties in the master's office after decree by notice, and the plaintiff's costs of making them defendants by bill were disallowed in revision of taxation. *Jackson v. Hammond et al.*, 8 P. R. 157.—Thom, *Taxing Officer*.

3. *Decree.*

Although a decree of sale should direct the same to take place with the approbation of the Master, the omission of such direction is no ground for moving to set aside the sale under the decree, where the same really took place with such approbation, even in a case where infants are interested. *Ricker v. Ricker*, 27 Chy. 576.

4. *Costs.*

Where mortgagees had a surplus in their hands after a sale under their mortgage, and S. claimed the surplus, but refused to give such proof as the mortgagees required of his title thereto:—Held, that as the mortgagees had acted reasonably in requiring proper proof, and failing to get it, had paid the surplus into court, they were entitled to their costs, of so doing, and to their costs of appearing on S's, application to have the money paid out to him. *Re Kingsland*, 8 P. R. 77.—Spragge.

See *Jackson v. Hammond et al.* 8 P. R. 157, *supra*.

5. *Other Cases.*

In a foreclosure suit the official assignee of an insolvent defendant paid \$150 into court to procure a sale. The proceeds derived from the sale were much more than sufficient to pay the plain-plaintiff's claim in full, but were insufficient to pay the subsequent incumbrancers:—Held, that the deposit should be applied in reduction of the second mortgagee's claim. *Gzowski v. Beaty et al.*, 8 P. R. 146.—Blake.

The bill was filed by a second mortgagee the first mortgagee not being made a party. At a sale under the decree, M. purchased the land, and afterwards paid the purchase money into court; he then mortgaged the land, then conveyed his equity of redemption, and then took out a vesting order. Grant, a subsequent mortgagee, claimed payment of his claim out of the

moneys in court. On the application of M., the referee made an order, directing payment to the assignee of the first mortgagee of his claim out of the purchase money in court. It appeared that M. thought he was purchasing free from incumbrances, and was ignorant of the first mortgage. On appeal, Proudfoot, V.C., upheld the Referee's order. *Fleming v. McDougall*, 8 P. R. 200.

A mortgagee proceeded in ejectment against a mortgagor, and afterwards filed a bill in chancery against him for a sale:—Held, that as the mortgagee could since the Administration of Justice Act, obtain in the chancery suit all the remedies he could obtain in the ejectment suit, the latter should be stayed forever. *Hay v. McArthur*, 8 P. R. 321.—Dalton, Q. C.

Where a mortgagee comes in under a decree for partition or sale, and proves his claim and consents to a sale, he is not entitled to six months' interest, or six months' notice. *Re Houston—Houston v. Houston*, 2 O. R., Chy. D. 84.

See *Cruso v. Close*, 8 P. R. 33, p. 471.

XI. PROCEEDINGS IN MORTGAGE SUITS.

1. *Taking Accounts.*

The special endorsement on a bill claimed a certain amount to be due under the mortgage (which contained the usual covenant to insure). After the service of the bill the plaintiff paid certain premiums of insurance. Blake, V. C. directed notice of settling decree and taking accounts to be served, and the plaintiff's claim to be allowed on proof of the payments being produced. *English and Scottish Investment Co. v. Gray*, 8 P. R. 199.

A decree for redemption was made, which directed an account to be taken of the amount due by the plaintiff, representing the mortgagor, to the defendants. The defendants, on proving their claim in the master's office, produced their mortgages, and filed an affidavit verifying their claim, and stating that \$20,309.88 was due them for moneys advanced by them to the mortgagor and secured by the said mortgages:—Held, by the Master in Ordinary and affirmed by Blake, V. C. that their claim was *prima facie* proven, and the onus of reducing the amount of it rested on the plaintiff. *Court v. Holland—Ex parte Doran*, 8 P. R. 213.

Where an amendment in a matter of account, as stated in the pleadings, would be allowed before decree, a similar amendment should also be allowed, if asked for, in respect of the accounts filed after decree, in the Master's office. *Court v. Holland*, 4 O. R., Chy. D. 688.

See also *Court v. Holland—Ex parte Holland and Walsh*, 8 P. R. 219.

2. *Amendment of Statement of Claim.*

The plaintiff indorsed his writ of summons and filed his statement of claim to recover possession of the land in dispute, as being the assignee of a lease made by him to the defendants, who assigned to a third party, who assigned and surrendered to the plaintiff. The defence was that the lease was in effect a mortgage, and fraud and want of consideration were alleged:—Held, that

the plaintiff could not amend his statement of claim, and ask a foreclosure of the land as mortgagee. *McIlhargy v. McGinnis et al.*, 9 P. R. 157.—Wilson.

3. Costs.

42 Vict., c. 20, s. 11, O., authorizing the taxation of a mortgagee's costs by any party interested, without any order to tax, applies to mortgages executed before the passing of the Act. *Ferguson v. English and Scottish Investment Co.*, 8 P. R. 404.—Taylor, Master.

Multiplicity of suits by mortgagee where only one suit necessary. See *Merchants' Bank v. Sparkes* 28 Chy. 108, p. 476.

On proceeding with the reference under the decree pronounced on the hearing, as reported 28 Chy. 356, the Master by his report found that there was due to the plaintiff \$1,104.99, which included a sum of \$171.32 costs incurred in the suit brought by him to redeem:—Held, on appeal, (affirming the report of the master)—(1) that the plaintiff was entitled to claim the costs so incurred, that proceeding having been taken in reality in defence of his rights as owner of an equity of redemption with the concurrence of C., through whom the appellant claimed—and, (2) that neither of the defendants could dispute the findings in that suit, but were estopped from questioning the amount found due therein to the same extent as Jarvis under whom they claimed would have been, the proceeding being not in respect of a matter collateral to the mortgage in question in that suit, but virtually upon the same instrument, and that therefore the rule as to estoppel by deed applied. *Pierce v. Canavan*, 29 Chy. 32.

A reference in a mortgage suit was directed to take accounts and to inquire whether a sale or foreclosure would be more beneficial. There were no incumbrancers. The defendants claimed credit for payments endorsed on the back of the mortgage, which were in the deceased mortgagee's handwriting, but for all of which the defendants did not hold receipts. The plaintiffs disputed the payments not covered by the receipts. On revision the taxing officer disallowed the costs of the reference, as the master had found in favour of the defendants' contention:—Held on appeal that under G. O. Chy. 312, the revising officer might refer to the papers before the master, and determine from them whether the proceedings were unnecessarily taken and that so much of the reference as related to the question whether foreclosure or sale was most beneficial ought to be allowed. Held, also, that if the credits endorsed on the mortgage were made by the mortgagee or signed by him, the plaintiff, his executor, ought not to have questioned the amount, and so much of the costs of the reference caused by taking an account should not be allowed. *Purdy v. Parks*, 9 P. R. 424.—Proudfoot.

Where a mortgagee sold under a power of sale in his mortgage, and the mortgagor afterwards brought action against him for an account, and payment over to him, of the surplus which he alleged was in the mortgagee's hands, and on taking the account it was found a balance of \$136, was payable to the mortgagor:—Held, that the mortgagee must pay to the mortgagor his full costs of suit. *Boulton v. Rowland*, 4 O. R., Chy. D. 720.

See *McDonald, McDonald and Marsh*, 8 P. R. 88, p. 468. *Re Cronyn, Kew and Betts*, 8 P. R. 372, p. 468. See also *Kempt v. Macauley*, 9 P. R. 582.

4. Other Cases.

Suit by creditors of mortgagee to attach mortgage debt. See *Menzies v. Ogilvie*, 27 Chy. 456, p. 33.

A mortgagee proceeded on the same day to foreclose the property of the mortgagor and his sureties by several bills upon their respective mortgages, and to sue at law in different actions the same parties on notes held by the plaintiffs to which the mortgages were collateral:—Held, that only one suit in equity was necessary, as all parties might have been brought before the court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits, and the court would not be deterred from granting the relief by the circumstances of the decree being complicated. There were consent minutes between the parties, except as to costs at law and in this court. Spragge, C. ordered the plaintiff to pay the costs of the argument before him, unless they were included in the matters the subject of the consent minutes. *Merchants' Bank v. Sparkes*, 28 Chy. 108.

XII. MISCELLANEOUS CASES.

Where a purchaser of part of an estate subject to mortgage gave a covenant to pay a proportion of the mortgage money, and a bill was filed by the vendor's assignee to compel payment by the purchaser, the Court refused to give such relief, except upon the terms of the vendor's share of the mortgage debt being paid at the same time, although there was no covenant on the part of the vendor that he would pay. But the court refused to include a direction that the payment by the purchaser of his share should be conditional on the payment by other and independent purchasers of other parts of the estate of their shares of the sum due. In such a case, however, it would seem that any of such purchasers paying the amounts properly payable by others would be entitled to use the name of the plaintiff in proceedings against such defaulting purchasers, upon indemnifying him against costs. *Clemow v. Booth*, 27 Chy. 15.

Held, that the giving of a mortgage by a devisee was not a violation of a restraint against alienation. See *Smith v. Faught et al.*, 45 Q. B. 434.

A mortgage is a "contract" within the meaning of the Insolvent Act of 1875, s. 130. *Smith v. Harrington*, 29 Chy. 502.

Fiduciary relations between mortgagor and mortgagee. See *Thompson v. Holman*, 28 Chy. 35; *Kilbourn v. Arnold*, 6 A. R. 158.

Held, that the statute 42 Vict. c. 22, O.: "An Act to amend the law of dower" does not apply to mortgages made before it was passed. *Martindale v. Clarkson*, 6 A. R. 1.

In 1861, W. M., the owner of real estate, created a mortgage thereon in favour of J. T. for \$4,000. In 1863 he executed a subsequent mort-

gage in favour of J. M., the appellant, to secure the payment of \$20,000 and interest, which was duly registered on the day of its execution. In 1866, W. M. executed another mortgage to the respondent C., for the sum of \$4,000, which was intended to be substituted for the prior mortgage of that amount, and the money obtained thereon was applied towards the payment thereof, and J. M. executed an agreement under seal—a deed poll—consenting and agreeing that the proposed mortgage to respondent C. should have priority over his. In 1875, J. M. assigned his mortgage for \$20,000 to the Quebec Bank, without notice to the bank of his agreement, to secure acceptances on which he was liable, which assignment was registered, and superseded the agreement, which C. had neglected to register. C. filed his bill against the executors of W. M., and against J. M., and the bank. The Court of Chancery held that the respondent was not entitled to relief upon the facts as shewn, and dismissed the bill. The Court of Appeal affirmed the decree as to all the defendants, except as to J. M., who was ordered to pay off the respondent's (plaintiff's) mortgage, principal and interest, but without costs. J. M. thereupon appealed to the supreme court of Canada:—Held, affirming the judgment of the Court of Appeal, 5. A. R. 503, reversing 26 Chy. 280, (Strong, J., dissenting), that as appellant could not justify the breach of his agreement in favour of C., he was bound both at law and equity to indemnify C. for any loss he sustained by reason of such breach. *McDougall v. Campbell*, 6 S. C. R. 502.

Right of municipal corporation to take a mortgage from a manufacturer securing performance of conditions on which bonus was granted. See *The Corporation of the Village of Brussels v. Ronald et al.*, 4 O. R. 1.

If a person borrows money from an innocent lender, and employs it in preferring a creditor, the lender is not debarred from suing for its repayment; and if he holds security, such as the mortgage from J. and R. to D., in this case, he can charge the money so loaned on such security. *Court v. Holland et al.*, 4 O. R., Chy. D. 688.

See *McLennan v. Hannum*, 31 C.P. 210, p. 414; *Mitchell v. Strathy*, 28 Chy. 80 p. 396.

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I. EXTENSION AND SEPARATION OF MUNICIPALITIES.

1. *Debts and Liabilities how affected*.

The bill alleged that the municipal councils of the respective corporations had adopted and sanctioned certain terms and conditions for dividing and settling the several liabilities and assets of the corporations upon their separating, and that both parties accepted such settlements as a final settlement between them, and acted thereupon:—Held, on demurrer, that it was not necessary to allege that such acceptance was by by-law; although Semble that at the hearing it might be necessary to establish that such was the fact. *The Corporation of the Village of Gravenhurst v. The Corporation of Township of Muskoka*, 29 Chy. 439.

See also Sub-head, XII., p. 493.

II. MEMBERS OF COUNCILS.

1. *Qualification*.

The defendant was not assessed for the year 1880, but in that year was assessed, on the 3rd of September, for the year 1881, upon unincumbered leasehold property of the value of \$4,100. By by-law of the city of Ottawa this assessment was revised before the 15th November, and returned before the 31st December as and for the assessment roll for the year 1881. No appeal was had therefrom. The nomination took place on the 27th December, 1880, and the defendant was elected mayor of Ottawa on the 3rd January, 1881:—Held, that the election commenced on the nomination day; and the assessment roll mentioned, which was to take effect in 1881, and not before, was not the last revised assessment at that time, within the meaning of the by-law and R. S. O. c. 180, s. 44, and the defendant could not qualify thereon. *Regina ex rel. Clancy v. McIntosh*, 46 Q. B. 98.

E. P. being the lessee of certain premises, he assigned his interest to H. P. after the assessment roll for that year had been returned, with E. P. assessed for the property. No notice of appeal against the assessment was served until several days after the time limited for so doing had expired. The court of revision, on appeal, substituted H. P. for E. P. on the roll. On an application to set aside the election of H. P. as an alderman, on the ground that the defendant was not rated on the roll when it was made out, and that he was not sufficiently qualified:—Held, that the assessment roll was absolutely binding; and that its correctness could not be tried upon such an application: and that the want of notice was cured by R. S. O. c. 180, s. 53. *Regina ex rel. Hamilton v. Piper*, 8 P. R. 225.—Dalton, Q. C.—Armour.

Held, under 43 Vict., c. 24, s. 3, that in estimating the defendant's property qualification, the amount of the mortgages upon the property must be deducted from the assessed, and not from the real value. *Regina ex rel. Kelly v. Ion*, 8 P. R. 432.—Osler.

On the 9th December the liquor license of Booth Bros., of which firm respondent was a member, was transferred to one of the partners, T. H. Booth. The nomination took place on 22nd December. On the books of the registry office the respondent's freehold property appeared incumbered to nearly its assessed value. It was shewn that the mortgages had been reduced, so as to leave the property worth, according to the assessed value, \$963 over and above incumbrances:—Held, that the property qualification was sufficient, but that the respondent was the holder of a license within the meaning of R. S. O. c. 174, s. 74. *Regina ex rel. Brine v. Booth*, 9 P. R. 452.—Dalton, Master. Affirmed on appeal to the Q. B. Div. 3 O. R. 144.

2. *Disqualification*.

A municipality passed a by-law to exempt from taxation, for a term of years, a mill to be built within its limits by a firm of which defendant was a member:—Held that there was a contract subsisting between defendant and the municipality, and that he was therefore disqualified from holding the office of reeve. *Regina ex rel. Lee v. Gilmour*, 8 P. R. 514.—Osler.

An unlicensed person who, under the colour of a license to his son, whether in collusion with the latter or on his own responsibility, sells liquor by retail, is not disqualified under sec. 74 of the Municipal Act from holding the office of alderman, though he may have rendered himself liable to penalties for breach of the Liquor License Acts. *Regina ex rel. Clancy v. Conway*, 46 Q. B. 85.

The declaration of qualification not having been made, leave was given to the defendant to make the same within ten days, otherwise leave was granted to file an information on the ground that the defendant illegally exercised the franchises of the office. *Id.*

The defendant and his brother were carrying on business as Booth Bros., and had a license in the name of the firm to sell intoxicating liquors. Before the nomination of members of the Park-

dale council the defendant, with the consent of the license commissioners, transferred his interest in the license to his brother, in order to qualify as a councillor, but the business continued as before :—Held, affirming the decision of the master in Chambers, 9 P. R. 452, that a license cannot lawfully be transferred except in the cases mentioned in R.S.O. c. 181, s. 28, none of which had occurred here: that the consent of the commissioners did not validate the transfer, and therefore that the defendant, who retained his interest in the license, was not qualified to be a councillor. Per Armour, J. The Act disqualifying a licensee should be construed strictly, and should not be extended to the partner of a person lawfully holding a license in his own name. *Regina ex rel. Brine v. Booth*, 3 O. R., Q. B. D. 144.

IV. CONTROVERTED ELECTIONS.

1. Who may be Relator.

Held, that an alderman's right to the office on the ground of an insufficient declaration of qualification and for the want of qualification at the time of his election, might be questioned by a quo warranto at the instance of a ratepayer not a voter of or resident in the ward, and who therefore could not be a relator under the Municipal Act. *Regina ex rel. White v. Roach*, 18 Q. B. 226, and *Kelly v. Macarow*, 14 C. P. 457, distinguished. *Regina ex rel. Clancy v. St. Jean*, 46 Q. B. 77.

2. Practice.

(a) Time for Moving.

Held, that the relator in this case was not too late, having applied in the next term after the election, and only one day after the time for moving under the statute. *Regina ex rel. Clancy v. St. Jean*, 46 Q. B. 77.

See *Regina ex rel. Clancy v. McIntosh*, 46 Q. B. 98, p. 483.

(b) Disclaimer.

Defendant was elected to the office of councillor for a town, and accepted the office. Subsequently and before the issue of the writ of quo warranto, the defendant knowing that his election was to be contested, sent the following instrument to the council: "Palmerston, February 7th, 1881. To the Mayor and Council of the town of Palmerston: Gentlemen, I beg to disclaim my seat at the council board. (Signed) G. S. Davidson."—Held, that the above disclaimer, not being in the form prescribed by R. S. O. c. 174, s. 194, was not sufficient to relieve the defendant from costs. *Regina ex rel. Mitchell v. Davidson*, 8 P. R. 434.—Osler.

Sec. 195 of the Municipal Act provides that the effect of a party disclaiming the office to which he has been elected shall be to give the same to the candidate having the next highest number of votes:—Held, that this meant the candidate having such number of votes who has not been elected to the council. Therefore, where the plaintiff was the candidate who was fourth in that order, the three highest on the list hav-

ing been declared elected, and one at the head of the poll resigned his seat, an injunction was granted to restrain the reeve and councillors of the village from preventing the plaintiff entering upon and discharging the duties of such office. *Smith v. Petersville*, 28 Chy. 599.

The notice of the party resigning the office stated that he resigned his "seat" in the council:—Held, sufficient; that the plaintiff was entitled to his costs, although the Act requires notice of a resignation of the "office" to be given. *Id.*

(c) Costs.

A municipal election set aside, but without costs to the relator, on the ground that he was a confidential officer, (auditor,) of the corporation, following *Regina ex rel. McMillan v. DeLisle*, 8 U. C. L. J. 290. *Regina ex rel. Brine v. Booth*, 9 P. R. 452.—Dalton, Master.

See *Regina ex rel. Mitchell v. Davidson*, 8 P. R. 434, p. 481; *Smith v. Petersville*, 28 Chy. 599, *supra*.

(d) Powers of County Court Judge.

A county court judge has power to grant a fiat in term time for the issue of a writ of quo warranto to try a contested municipal election:—Held, that Rule 1. M. T. 14 Vict., has become inoperative by the effect of subsequent statutory enactments, to which it is repugnant. *Regina ex rel. McDonald v. Anderson*, 8 P. R. 241.—Osler.

A writ of summons in the nature of a quo warranto having been issued, under R. S. O. c. 174 s. 179, on the fiat of a county court judge, returnable before himself, to try the validity of the election of an alderman of one of the wards of a city, the county court judge, before appearance entered, made an order setting aside his fiat and the writ with costs for irregularity in the proceedings. On appeal from the decision of the chief justice of the Court of Queen's Bench, 8 P. R. 497, discharging a summons to set aside such order: Per Wilson, C. J., the county court judge had the power to make the order. Per Osler, J., he had no such power, his power being limited to trying the validity of the election. The court being equally divided the appeal dropped. *Regina ex rel. O'Dwyer v. Lewis*, 32 C. P. 104.

The judge of the county court ordered a writ of quo warranto to test the validity of the election of an alderman; and subsequently, before appearance entered to the writ, set aside all proceedings in the matter for irregularity. The relator thereupon applied in Chambers for a mandamus to compel the county judge to try the case, when the presiding judge (Hagarty, C. J.) refused the writ, 8 P. R. 497, and on motion in banc, the court affirmed his ruling, 46 Q. B. 175. On appeal from this judgment, the appeal was dismissed on the ground that the order of the county judge, if he had authority to make it, was not subject to review; and if it could be reviewed the application should have been to the court, not to a judge in Chambers, as here; and under all the circumstances the appeal was dismissed,

but without costs. The writ of quo warranto having been issued and served, the county court judge had not power to set it aside. *Regina ex rel. Grant v. Coleman*, 7 A. R. 619.

V. ACCEPTANCE AND DECLARATION OF OFFICE.

The declaration required by the Municipal Act R. S. O. c. 174, s. 265, from every person elected under the Act to any office requiring a property qualification, is a pre-requisite to the discharge of the duties of such office. Where an alderman elect did not state in his declaration the nature of his estate in, or the value of the land, but declared that his property was sufficient to qualify him "according to the true intent and meaning of the Municipal Laws of Upper Canada"—Held, that the declaration was insufficient. *Regina ex rel. Clancy v. St. Jean*, 46 Q. B. 77.

The acceptance of office by a mayor elect, referred to in R. S. O. c. 174, s. 180, within a month from which a writ of quo warranto to try the validity of his election must issue, is a formal acceptance by the statutory declaration of qualification and office, and not a mere verbal acceptance by speech to the electors, or such like. *Regina ex rel. Linton v. Jackson*, 2 Chamb. R. 18, dissented from. *Regina ex rel. Clancy v. McIntosh*, 46 Q. B. 98.

The declaration of qualification not having been made, leave was given to the defendant to make the same within ten days, otherwise leave was granted to file an information on the ground that the defendant illegally exercised the franchises of the office. *Regina ex rel. Clancy v. Conway*, 46 Q. B. 85.

VI. VACATING OFFICE BY NON-ATTENDANCE.

The plaintiff and others, councillors of the town of Petrolia, attended a meeting of the council on the 5th April. They were absent at the next meeting called for and held on the 31st May and thenceforward, without authorization, till the 7th of July, when, at a meeting of the council, a resolution declaring their seats vacant and ordering a new election was put, and an amendment to refer the matter to the town solicitor was lost; whereupon the dissentients left the room, in consequence of which there was no quorum, when the original motion was put and carried:—Held, (1) that the three months should be counted from the 31st May, being the first meeting that the plaintiffs had not attended; and that the resolution was therefore void, as well as on the ground that there was no quorum present when it was passed; (2) that the court had jurisdiction to entertain a motion for an injunction restraining the defendants from interfering with the plaintiffs in the exercise of their official duties, and that the injunction might be awarded upon an interlocutory application. *Mearns v. The Corporation of the Town of Petrolia*, 28 Chy. 98.

VII. MEETINGS OF COUNCIL AND CONDUCT OF BUSINESS.

See *Mearns v. The Corporation of the Town of Petrolia*, 28 Chy. 98, *supra*.

VIII. OFFICERS OF THE CORPORATION.

1. Tenure of Office.

Municipal officers appointed by the council hold office during the pleasure of the council and may be removed without notice and without cause. *Wilson v. York*, 46 Q. B. 289.

2. Treasurer and his Sureties.

Liability of corporation for fraudulent act of its clerk and treasurer acting within the scope of his authority, the corporation having received the benefit of the fraud. See *The Molsons Bank v. The Corporation of the Town of Brockville*, 31 C. P. 174, p. 69.

Where a township treasurer was by his bond dated 6th October, 1874, bound to duly account for all moneys coming into his hands and applicable to the general uses of the municipality:—Held, that clergy reserve moneys and money derived from the distribution of the provincial surplus, which had by by-law been specifically appropriated to educational purposes, were not within the condition of the bond, and that the operation of this bond was not extended to school moneys by the R. S. O. c. 180, s. 213, and R. S. O. c. 204, s. 221. *The Corporation of the Township of Oakland v. Proper et al.*, 10 R., Chy. D. 330.

IX. BY-LAWS.

1. Generally.

A by-law must be reasonably clear and unequivocal in its language in order to vary or alter the common law or statutable rights. *Crowe v. Steeper et al.*, 46 Q. B. 87.

Semble, that R. S. O. c. 174, s. 277, enacting that the powers of township councils shall be exercised by by-law—must be construed as referring only to the exercise of powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another Legislature. *The Corporation of the Township of Pembroke v. The Canada Central R. W. Co.*, 30 R., Chy. D. 503.

See *Regina v. Pipe*, 1 O. R. 43, p. 493.

2. Quashing By-Laws.

(a) By-laws not passed in the Interest of the Public.

A by-law for closing up a square dedicated to the public and disposing of part thereof to a church contained a provision that the trustees of the church should pay all expenses in connection with the by-law, and that it should not take effect till the municipality had been indemnified against loss by reason of passing it and of any proceedings to quash it:—Held, bad on its face, for it was plainly not passed in the public interest, but for the benefit of a particular class. *In re Peck and the Corporation of the Town of Galt*, 46 Q. B. 211.

See *In re Morton and the Corporation of the City of St. Thomas*, 6 A. R. 323, p. 200.

(b) *Who may Move.*

Held, that the applicant in this case was not precluded from moving against the by-law by reason of his having expressed an opinion in its favour before its passage. *In re Peck and the Corporation of the Town of Galt*, 46 Q. B. 211.

(c) *Time for Moving.*

The by-law dissolving a union of school sections was passed on the 7th April, and the application to quash was not made until December following:—Semble, that this delay, unexplained, would have been an answer to the application, which may be too late, although within the year fixed by the Act as the extreme limit. *In re McAlpine and the Corporation of the Township of Euphemia*, 45 Q. B. 199.

Where the plaintiff filed his bill seeking to quash a certain municipal by-law, passed to open a road, and also an award made thereunder:—Held, that there was nothing inconsistent in this, and the plaintiff was not bound to elect between attacking the by-law and attacking the award. Where, however, under such circumstances, the plaintiff, being called on by the court to elect, had elected to attack the award, and consented to a decree setting it aside, and ordering a new arbitration, which arbitration he had prosecuted until another award was made, which he had not moved against within the time allowed therefor:—Held, he could not afterwards complain of having been forced to elect at the hearing. *Harding v. Corporation of the Township of Cardif*, 2 O. R., Chy. D. 329.

Held, that the by-law in question not being void on its face, nor ultra vires, and the plaintiff not having attacked it for more than a year after its passing, but having on the contrary appointed an arbitrator to assess compensation thereunder, it had now become absolute and incontrovertible:—Held, also, although such a by-law may not become effectual in law till registration thereof, nevertheless non-registration does not prolong the time allowed by R. S. O. c. 174, s. 323, within which it may be quashed, and such time does not count from the registration. *Ib.*

(d) *Costs.*

Costs were not asked for in the rule, though they were at bar:—Held, that as costs are in the discretion of the court under the Judicature Act, this was no objection. *In re Peck and the Corporation of the Town of Galt*, 46 Q. B. 211.

X. GENERAL POWERS AND DUTIES OF CORPORATIONS.

1. *Eminent Domain.*

A by-law passed by a municipal corporation cannot have the effect of taking any lands of the Crown in addition to those appropriated by the Crown for the purpose of highways in order to the opening up of the country. *Rae v. Trim*, 27 Chy. 374.

There is a distinction between the rights conferred upon municipal corporations and railway

companies respectively to expropriate property, the former existing for the public good, the latter being commercial enterprises only. The charters of the latter are therefore more rigidly construed than are the powers of a municipal corporation. *Harding v. The Corporation of the Township of Cardif*, 29 Chy. 308.

Upon a construction of sections 373 and 456 of the municipal Act, (R. S. O. c. 174) a municipal corporation has power to enter upon and take lands for the purposes permitted by the Act without first making compensation to the owner who is not entitled to insist upon payment as a condition precedent to the entry of the corporation. *Ib.*

Where a municipal corporation had so entered, and a bill to set aside an award for improper conduct of the arbitrators and inadequacy of compensation failed, the court (Proudfoot, J.) on dismissing the bill ordered the plaintiff to pay all costs, as the corporation had properly exercised their statutory rights. The question involved being of a public nature, the fact that the award was for an amount which in other cases would be beneath the dignity of the court, was not any reason why the court should not entertain the suit. *Ib.*

2. *Granting to Railways Lands Expressly Appropriated to Public Purposes.*

See *In re Bronson et al., and the Corporation of the City of Ottawa*, 1 O. R. 415.

3. *Bonuses to Manufacturing Companies.*

Held, affirming the judgment of Proudfoot, V. C., that a municipality, under 36 Vict. c. 48, s. 372, sub-s. 5, O., has power to lend money for the encouragement of a manufacturing establishment, notwithstanding the use of the word "bonus" therein, which does not necessarily import a gift; and they are therefore liable on debentures issued for the purpose of raising money to be so lent. The rate of interest on the debentures was seven per cent:—Held, that sec. 217 of 29 & 30 Vict. c. 51, has not been repealed, though marked effete in the schedule prefixed to, and not re-enacted in, 36 Vict. c. 48, O., and that the above rate was therefore lawful. Quære, whether the power to give would not include power to lend. If there had been no power to lend, and the mortgage taken by the municipality to secure repayment of the money lent was invalid:—Quære, whether this would afford any defence to the debentures; and Quære also, whether the municipality having received the consideration stipulated for, the debenture holders might not have some remedy against the municipality, though not by direct suit on the debentures. *Scottish American Investment Co. v. Corporation of the Village of Elora*, 6 A. R. 623.

Where the plaintiffs, a municipal corporation, passed a by-law to raise \$20,000, to be given to the defendant to aid him in carrying on certain manufactures in the municipality, subject to a condition that he should give a mortgage on the premises for \$10,000, and a bond for a further sum of \$10,000, which said securities should be conditioned for the carrying on of such manufactures for twenty years, and that during the

said period he should keep invested at least \$30,000 in the factory; and the defendant gave the bond and mortgage, conditioned as agreed, but the latter not specifying for what sum it was a security, and invested the \$30,000 but did not carry on the manufactures as agreed:—Held, that R. S. O. c. 174, s. 454 authorized the taking of the mortgage by the corporation: that it must be taken to be not a charge for any specific sum, but a security for any damages the plaintiffs might have sustained by the defendant's default to an extent not greater than \$10,000; that the court would relieve against a forfeiture of the estate; and there should be a reference to ascertain the amount of the said damages, and on non-payment, a sale of the premises. *The Corporation of the Village of Brussels v. Ronald et al.* 4 O. R., Chy. D. 1.

5. Drainage of Lands.

(a) Petition.

A petition was presented under section 529 of the Municipal Act for the draining of certain lands, by constructing a drain in a certain direction and deepening a stream. The petition was signed by eighteen persons, being a majority of those shewn by the assessment roll to be benefited by the work, viz., thirty-three. A resolution of the council was passed under which surveys and estimates were made. Subsequently five of the petitioners withdrew, some by petitioning for a simple clearing of the bed of the stream and some by informing the council that they would dig their own drains themselves. By a subsequent petition three more desired to do the work themselves. By another petition seven interested persons desired to add their names to those who were in favour of the work. The names of the six of the original petitioners remaining were not in the schedule to the by-law of those to be benefited. This left the number of petitioners at eleven. The council having procured a second estimate, shewing that by diverting the direction of the drain the work could be done at less expense, passed a by-law reciting that a majority of those to be benefited had petitioned, and providing for the construction of the work according to the altered plans. No debentures had been issued, nor contracts let, when a motion was made to quash the by-law. Held, that the by-law should be quashed; for (1) the council had no power to authorize the undertaking of any work other than that petitioned for, and if that was impracticable or too costly they should have refused the petition; (2) the petitioners had the right to withdraw at any time after subscribing the petition, and before the contracts were let or the debentures negotiated, *i. e.*, while the council had control of the matters, the preliminary surveys and estimates being as much for the information of the petitioners as of the council; (3) a sufficient number of petitioners having withdrawn to reduce the number below the majority of those to be benefited, the by-law untruefully recited that a majority, &c., had petitioned. *Re Misener v. The Township of Wainfleet*, 46 Q. B. 457.

A petition for a drainage by-law was signed by a majority of the owners of the land designated in the petition, but the applicant was not one of the petitioners, nor was his land part, nor did

he reside on any part of the land described in the petition, but the surveyor who made the examination and prepared the estimates reported that his land would be benefited by the works, and he was accordingly assessed, and the by-law was finally passed:—Held, that the by-law was valid. *In re White and the Corporation of the Township of Sandwich East*, 1 O. R., Q. B. D. 530.

(b) Publication of By-Laws.

The omission of the words, "during the term next ensuing the final passing of the by-law," from the notice with regard to a drainage by-law, under R. S. O. c. 174, s. 531, does not render the by-law invalid. *Re McLean and the Corporation of the Township of Ops*, 45 Q. B. 325.

Where a by-law finally passed differs from that published only in respect of changes made in the assessment by the court of revision and county judge, it is not necessary to publish such by-law again after such changes. *Id.*

A proposed by-law of the township of Rochester, in the county of Essex, relating to drainage, was published in a newspaper in Windsor, a large town, and, for all other than judicial and municipal business, practically the county town, and situate two miles from Sandwich, the county town. There was no newspaper published either in Rochester or in Sandwich, or in the next adjoining municipality; but there were papers published in several small villages, somewhat nearer the township of Rochester than Windsor, but their circulation was much smaller in Rochester than that of the Windsor paper:—Held, that the publication was sufficient; since if the words "adjoining local municipality," as used in 42 Vict. c. 31, s. 27, were construed "next adjoining," &c., it would be impossible to publish the by-law as directed by the Act; and it did not form sufficient ground of objection thereto, that there were other papers a few miles nearer to Rochester than Windsor was. *Re Gallerno and the Township of Rochester*, 46 Q. B. 279.

It was objected that no copies of the by-law or notices attached were posted up as required, but the applicant knew of the by-law before it passed, and appealed from his assessment to the court of revision:—Held, that the objection should not be given effect to. *In re White and The Corporation of the Township of Sandwich East*, 1 O. R., Q. B. D. 530.

(c) Assessment.

Where the engineer who made the assessment under a drainage by-law was not notified, and was not present at the Court of Revision, but was present on the appeals therefrom to the county judge, which were taken by all who appealed to the Court of Revision:—Held, no ground for setting aside the by-law. *Re McLean and Corporation of the Township of Ops*, 45 Q. B. 325.

The engineer is the proper party to make the assessment. The principle on which the assessments were made, of assessing against a whole lot or a part of a lot owned by one person, when only some of its acreage was benefited, the value of such benefit:—Held, not erroneous; and this

would at all events have formed no ground for quashing the by-law, as this was a matter of which complaint might have been made to the Court of Revision. *Ib.*

It was alleged that one member of the council was largely interested in the property to be drained by the by-law but,—Held, that no interest, which springs solely from his being a ratepayer, can disqualify a councillor or a member of a Court of Revision from performing his duties as such. *Ib.*

On appeal to the County Judge he reduced the assessment on one lot by only half, the owner F. consenting, although according to the evidence it should have been further reduced. In distributing the amounts struck off among the other properties assessed he added nothing to the assessment of this lot, so fixed by consent, but he certified that the other owners were assessed for less than they would have been but for F.'s consent:—Held, that R. S. O. c. 174, s. 530, sub-s. 13, had been practically complied with. *Ib.*

(d) Other Cases.

The arbitrators appointed by the plaintiff and defendant municipalities, on an appeal by the defendants from the report of the surveyor, made an award pursuant to the Municipal Act, whereby they adjudged that the deepening of a creek, &c., benefited lands in the defendant municipality, and that the latter should pay therefor \$350; but the award did not specify the lands which in their opinion were so benefited, nor charge such lands with a just proportion of the cost of the works:—Held, that for this reason the award was invalid. *The Corporation of the Township of Thurlow v. The Corporation of the Township of Sidney*, 1 O. R., Q. B. D. 249.

Held, that the question whether the lands are in fact benefited is one for the court of revision, or the judge of the county court on appeal therefrom. *In re White and The Corporation of the Township of Sandwich East*, 1 O. R., Q. B. D. 530.

Where, on the petition of the plaintiff and other rate-payers, a township corporation had passed a by-law for the construction of the B drain, and the assessment of the lands to be benefited thereby, part of which the plaintiff owned, but the drain had not been completed, though a reasonable time had elapsed, and a portion of the moneys assessed had been applied upon a certain other drain, not mentioned in the petition, the report of the public land surveyor made pursuant to R. S. O. c. 174, s. 529, or in the said by-law, and of no value to the said petitioners:—Held, that the plaintiff was entitled to an order compelling the corporation to complete the B drain according to the by-law, to an injunction to restrain further misapplication of the moneys assessed, and to an account thereof, for that the by-law created a trust which had been violated:—Held, also, that the plaintiff was entitled to maintain the action without the attorney-general. *Smith v. The Corporation of the Township of Raleigh*, 3 O. R., Chy. D. 405.

Held, also, that the fact that the moneys so assessed, were so diverted pursuant to a resolution of the council, passed in accordance with a

promise made to certain of the petitioners for the B drain, who signed such petition and submitted to assessment on the faith of such promise, was no justification of such diversion:—Held, lastly, that this was not a case for arbitration, or, at all events, not a case in which the plaintiff was bound to proceed in that manner. *Ib.*

6. Sewers.

Sec. 464, sub-s. 2, of 36 Vict. c. 48, enacts that the council of every city, town, and incorporated village, shall have power to pass by-laws for assessing upon the real property to be immediately benefited by the making, &c., of any common sewer, &c., "on the petition of at least two-thirds in number and one-half in value of the owners of such real property, a special rate," &c. The sub-s. is amended, so far as the same relates to the city of Toronto, by 40 Vict. c. 39, s. 2, by inserting after the words "owners of such real property" the words "or where the same is in the opinion of the said council necessary for sanitary or drainage purposes." 40 Vict. c. 6, respecting the revised statutes, passed in the same session, repealed 36 Vict. c. 48; and R. S. O. c. 174, s. 551, sub-s. 2, corresponds with the repealed s. 464, sub-s. 2:—Held, *Armour, J.*, doubting, and *Cameron, J.*, dissenting, 1. That under 40 Vict. c. 6, s. 10, the R. S. O., was substituted for the repealed Acts and the amending Act applied to the R. S. O. c. 174. 2. The amendment in 40 Vict. c. 39, was a reference in a former Act remaining in force to an enactment repealed, and so a reference to the enactment in the revised statutes, corresponding to the s. 464, sub-s. 2, within s. 11 of 40 Vict. c. 6. 3. That the city of Toronto, therefore, could pass a by-law in 1879 to construct a sewer, when necessary in their opinion for sanitary or drainage purposes, without any petition therefor. *In re Brock v. The Corporation of the City of Toronto*, 45 Q. B., 53.

7. Auctioneers.

The defendant having sold land by auction under a decree of the Chancery Division of the High Court of Justice, was convicted of a breach of the by-law of the county of Hnron, passed pursuant to the Municipal Act, R. S. O. c. 174, s. 465, sub-s. 2, providing that it should not be lawful for any person to sell by public auction anywares, goods, or merchandise of any kind without a license:—Held, that the conviction was clearly bad, for the by-law did not refer to lands; nor would the statute have authorized such a by-law. *Regina v. Chapman*, 1 O. R., Q. B. D. 582.

8. Transient Traders.

Where goods are consigned to be sold on commission, and they are sold in the shop or premises of the consignee, and by him or on his behalf, the owner of the goods or the manager is not an occupant of such premises, nor a transient trader within the Municipal Act (R. S. O. c. 174, s. 466, sub-s. 53, as amended by 42 Vict. c. 31, s. 22), merely because he accompanies the goods and assists in their sale:—Held, also, that the

validity of the by-law might be questioned on a motion to quash the conviction made under it. *Regina v. Cuthbert*, 45 Q. B. 19.

J. brought an action against G., the police magistrate of the city of St. John, for wrongfully causing the plaintiff, a commercial traveller, to be arrested and imprisoned on a warrant issued on a conviction by the police magistrate, for violation of a by-law made by the common council of the city of St. John, under an alleged authority conferred on that body by 33 Vict. c. 4, passed by the legislature of New Brunswick. Section 3 of the Act authorised the mayor of the city of St. John to license persons to use any art, trade, &c., within the city of St. John, on payment of such sum or sums as may from time to time be fixed and determined by the common council of St. John, &c.; and s. 4 empowered the mayor, &c., by any by-law or ordinance to fix and determine what sum or sums of money should be from time to time paid for license to use any art, trade, occupation, &c.; and to declare how fees should be recoverable; and to impose penalties for any breach of the same, &c. The by-law or ordinance in question discriminated between resident and non-resident merchants, traders, &c., by imposing a license tax of \$20 on the former and \$40 on the latter:—Held, that assuming the Act 33 Vict. c. 4, to be intra vires of the legislature of New Brunswick, the by-law made under it was invalid, because the Act in question gave no power to the common council of St. John, of discrimination between residents and non-residents, such as they had exercised in this by-law. *Jonas v. Gilbert*, 5 S. C. R. 356.

9. Markets.

The municipal council of the city of Hamilton passed a by-law that no person should, upon or after sale thereof, deliver any stove wood in or from any waggon &c., otherwise than in or from a waggon of a certain capacity, the sides of which should be constructed of slats of a certain width and a certain distance apart from each other. The defendant was convicted of a breach of the by-law:—Held, that the by-law was ultra vires, for though the council had the right under the Municipal Act, R. S. O. c. 174, s. 466, to provide for the weighing or measuring of wood, they had no power to enforce delivery, upon or after sale, in a particular kind of waggon. *Regina v. Smith*, 4 O. R., Q. B. D. 401.

10. Assize of Bread.

By-law 1128 of the city of Toronto declared what the weight of loaves should be, and enacted that the weight of each loaf sold or offered for sale should be stamped thereon, and that all bread offered for sale of any less weight than the weight fixed by the by-law should be seized and forfeited:—Held, that the by-law was intra vires and not unreasonable. *In re Nasmith and The Corporation of the City of Toronto*, 2 O. R., Q. B. D. 192.

11. Public Health.

The members of the council of any municipality are health officers of the municipality by virtue of the Public Health Act, R. S. O. c. 190,

and as such they may enforce the provisions of ss. 3 to 7 of that Act without by-law; but if they delegate their powers to a committee, they must do so by a municipal by-law. They cannot, however, delegate any powers except those which they exercise under the Public Health Act. A by-law was passed by the municipal council of the city of Brantford regulating the cleaning of privy-vaults, and imposing a fine of not less than \$1, nor more than \$50 for a breach of its provisions:—Held valid, as the by-law was one under the Municipal Act, and not under the Public Health Act, which restricts the penalty to \$20. The by-law, as set out in the report, was objectionable, as delegating to persons not members of the council, the board of health, the powers which, as municipal matters, belonged exclusively to the council. *In re Mackenzie and the Corporation of the City of Brantford*, 4 O. R., Q. B. D. 382.

12. Nuisances.

The defendants passed a by-law pursuant to R. S. O. c. 174, s. 466, sub-s. 17, as amended by 44 Vict. c. 24, s. 12, which by-law, by sec. 2 provided that "No person shall keep, nor shall there be kept within the city of Toronto any pig or swine or any piggery":—Held, that the by-law was ultra vires, as being a general prohibition against the keeping of pigs, and not restricted to cases that might prove to be nuisances. *McKnight v. The City of Toronto*, 3 O. R., Q. B. D. 284.

By sec. 3, sub-s. 2, the by-law provided that no cow should be kept in any stable, &c., situate at a less distance than forty feet from the nearest dwelling house, and where two cows were kept that the stable should not be less than eighty feet from the nearest dwelling house:—Held, that it was unnecessary to declare expressly that the keeping of cows within such distances was or might be a nuisance, but that the prohibition was in effect such a declaration, that the distances prescribed were reasonable, and that the by-law as to that was unobjectionable:—Semble, that it was not bad in being so generally expressed that it would restrict the owner from keeping cows within the prescribed distances of his own dwelling house, and Held, that this objection not being clear should not at any rate be allowed to prevail in favour of the appellant, whose case was not shewn to be within the terms of the objection. *Id.*

13. Cattle Running at Large.

See *Crowe v. Steeper et al.*, 46 Q. B. 87, p. 213.

14. Width of Tires.

A by-law of a town provided that no one should use any waggon, &c., upon any of the streets of the town for drawing brick, stoues, &c., when the weight of the load should exceed 1,500 pounds, unless the tires of the wheels were of a specified width; but the by-law was not to apply to any waggon conveying lumber or goods from the mill or manufactory thereof into the town if distant more than two miles from the town limits, nor to any person passing through the town with vehicles loaded with the said articles:—Held, bad, as discriminating against residents of the town in favour of others:—Held, also, that a conviction under such by-law was

bad, for not shewing that defendant was not a person passing through the town, and for imposing imprisonment with hard labour. *Regina v. Pipe*, 1 O. R., Q. B. D. 43. See *Hodge v. The Queen*, 9 App. Cas. 117, p. 120.

15. Fire Limits.

A city corporation passed a by-law under R. S. O. c. 174, s. 467, sub-s. 6, which defined fire limits, within which buildings were to be of incombustible material; the roofs to be of certain metals, or slate, or shingles laid in mortar not less than half an inch thick, and no roof of any building already erected within the fire limits to be relaid or recovered except with one of the enumerated materials. The defendant was convicted for having laid new shingles on his wooden house without laying them in mortar. The house had been standing for many years before the by-law was passed:—Held, that the by-law was ultra vires, in so far as it referred to existing buildings or ordinary repairs or changes thereof, not being additions thereto. *Regina v. Howard*, 4 O. R., Q. B. D. 377.

16. Public Morals.

The conviction was under a by-law, for writing and posting up an indecent placard, and the placard was a criminal libel. Quære, Per Cameron, J., whether the municipality could thus make a new offence, and award a new or additional punishment for what was already a criminal offence. *McLellan v. McKinnon*, 1 O. R., Q. B. D. 219.

XI. ACTIONS AND PROCEEDINGS BY AND AGAINST MUNICIPAL CORPORATIONS.

1. Generally.

Against surveyor for negligence in making improper survey. See *The Corporation of the Township of Stafford v. Bell*, 6 A. R. 273, p. 498.

Liability of municipal corporation for contract not under seal. See *Silsby v. The Corporation of the Village of Dunnville*, 8 A. R. 524, p. 148.

Compelling railway to repair highways. Frame of suit. See *Fenelon Falls v. Victoria R. W. Co.*, 29 Chy. 4.

Action for false imprisonment. Void assessment. See *McSorley v. The Mayor, &c., of the City of St. John et al.*, 6 S. C. R. 531.

Writ of prohibition to municipal corporation. See *Cote v. Morgan*, 7 S. C. R. 1, p. 31.

See *The Molsons Bank v. The Corporation of the Town of Brockville*, 31 C. P. 174, p. 69.

XII. MATTERS REFERRED TO ARBITRATION.

The court has power to enlarge the time for making an award, although the same has not been made "within one month after the appointment of the third arbitrator," as required by s. 377 of the R. S. O. c. 174. *In re the City of Toronto and Scott*, 8 P. R. 318.—Wilson.

The general enactments relating to arbitration apply to awards under the Municipal Act. *Ib.*

In extending the time in this case the matters referred were remitted to such persons as the court should appoint under the Municipal Act, s. 385. *Ib.*

Seemle, that the combined effect of secs. 377 and 380 of the Municipal Act, is to enable the arbitrators in cases coming within these sections to extend the time for making their award beyond the month. *Township of Thurlow v. Township of Sidney*, 29 Chy. 497.

The plaintiff municipality sued upon an award whereby the defendant municipality was ordered to pay their proportion of the cost of a drain constructed by the plaintiffs. It was shewn that the arbitrators met frequently and adjourned from time to time, counsel for the defendants appearing before the arbitrators and raising no objection to such adjournments, or that the month from the date of the appointment of the third arbitrator, as prescribed by sec. 337 of the Municipal Act, had elapsed without any award having been made:—Held, that an award made after the expiry of the month was valid. *Ib.*

Held, that the arbitrators on the separation of the united townships, under R. S. O., c. 174, s. 28, should not take into consideration moneys received by the union, under 36 Vict. c. 47, O., from the Government on account of the Municipal Loan Fund, and appropriated by the union to the purposes authorized by that Act; but that they might apportion any part of it remaining unappropriated, and in doing so need not be governed by the population of the several townships according to the census of 1871, as provided for the distribution by the Government under that Act. The duty of such arbitrators is to ascertain the assets of the union, real and personal; dispose of the personal property as may be just; make proper allowance for the real estate to the township deprived of it by the separation, and for the personal property assigned to either municipality in excess of its share; and ascertain and apportion the liabilities. They should consider the value of the real property of the union in each township as an asset, and what allowance, if any, should be made by the township retaining it under the statute to the separating township.—*In re the Corporation of the Township of Albemarle and the Corporation of the United Townships of Eastnor, Lindsay, and St. Edmunds*, 45 Q. B. 133.

The provisions of sec. 383 of the Municipal Act requiring arbitrators to take and file for the information of the court full notes of the evidence, or a statement that they proceeded upon skill or knowledge possessed by themselves, or upon a view, in making their award, are imperative, and the omission to comply with them is fatal to the award. *In re Albemarle, et al.*, 46 Q. B. 183.

From reading the award made in this matter, and the evidence and documents filed, it was impossible for the court to ascertain the reason for the award, and so impossible to consider the matter upon the merits as required by sec. 385; and the evidence and documents which were filed appeared not to support the award, which was therefore set aside. *Ib.*

The arbitrators having made two previous awards, which had both been referred back to them, and great expense incurred, the court

refused to refer the matter back to them, but ordered that it be remitted to the judge of the County Court, unless counsel could agree upon such facts as would enable the court to deal with the matters in dispute. *Ib.*

In proceedings upon arbitration between a city and county under secs. 22, 445, 446, and 447 of the Municipal Act, the questions submitted are largely in the discretion of the arbitrators, no principle or rule being laid down by the statute. Where, therefore, arbitrators, in forming estimates of the proportion of expenditure to be borne by the city and county under these sections, took population as a basis instead of the assessment rolls:—Held, that this was no ground for interference. The court refused also to interfere with the compensation awarded for care and maintenance of prisoners. The arbitrators having awarded as to the macadamized road lying in the county and city, a matter not submitted to them, the clause was struck out of the award with costs, which were fixed at \$10. *In re the Arbitration between the Corporation of the city of St. Catharines and the Corporation of the county of Lincoln*, 46 Q. B. 425.

A portion of the township of Sarnia was added to the town of Sarnia by proclamation of the Lieutenant-Governor. The former municipality was indebted to the Province for certain drainage works under the provisions of R. S. O. c. 33, in respect of roads benefited by the drains. The arbitrators, in settling the matters in dispute between the two corporations, refused to consider this indebtedness, and made their award without adjudicating thereon:—Held, that the award was invalid, for the liability in respect of the roads was an ordinary debt payable out of the general funds of the township, to which the town should contribute. The award directed the township to pay a certain sum to the town:—Held, bad; for the Municipal Act, R. S. O. c. 174, s. 53, only provides for a payment by the town to the township. *In re The Village of Point Edward and the Township of Sarnia*, 44 Q. B. 461, distinguished. *Re The Corporation of the Township of Sarnia and The Corporation of the Town of Sarnia*, 1 O. R., Q. B. D. 411.

See *Harding v. the Corporation of the Township of Cardiff*, 29 Chy. 308, p. 486; *Smith v. The Corporation of the Township of Raleigh*, 3 O. R. 405, p. 490. See also *Harding v. The Corporation of the Township of Cardiff*, 2 O. R. 329; *In re the Corporation of the Town of Ingersoll and Carroll*, 1 O. R. 488.

MUNICIPAL LOAN FUND.

See *In re the Corporation of the Township of Albemarle and the Corporation of the United Townships of Eastnor, Lindsay, and St. Edmunds*, 45 Q. B. 133, p. 494.

MURDER.

See CRIMINAL LAW.

MUTUAL INSURANCE COMPANY.

See INSURANCE.

NAME.

OF CORPORATIONS—See CORPORATIONS.

See also, *Sears v. The Agricultural Ins. Co. et al.*, 32 C. P. 535.

NATURALIZATION.

See ALIEN.

NE EXEAT REGNO.

WRIT OF, IN CASES OF ALIMONY—See HUSBAND AND WIFE.

The sureties on a statutory bail bond under a writ of ne exeat Provincia have no power to surrender their principal as at common law. An application by sureties for discharge from a bond and for repayment of the money paid to the sheriffs collateral security was refused. *Richardson v. Richardson*, 8 P. R. 274.—Proudfoot—Spragge.

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VI. OF ATTORNEYS—See ATTORNEY AND SOLICITOR.

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IX. BY FIRE—See FIRE.

X. BY RAILWAYS—See RAILWAYS AND RAILWAY COMPANIES.

XI. NEW TRIAL IN ACTIONS FOR—See NEW TRIAL.

I. CONTRIBUTORY NEGLIGENCE.

Liability of Accident Assurance Co. in cases of contributory negligence. See *Neill v. The Travellers' Ins. Co.*, 31 C. P. 394; 7 A. R. 570.

Submitting question of contributory negligence to jury. See *Bennett v. The Grand Trunk R. W. Co.*, 7 A. R. 470; *Maw v. The Townships of King and Albion*, 8 A. R. 248; *Edgar et ux. v. Northern R. W. Co.*, 4 O. R. 201.

See *Klein et al. v. The Union Fire Ins. Co. et al.*, 3 O. R. 234, p. 371; *Corporation of the Township of Stafford v. Bell*, 6 A. R. 273, *infra*. See also *McCallum v. Odette*, 7 S. C. R. 36.

See also "RAILWAYS AND RAILWAY COMPANIES."

II. PARTIES LIABLE.

Action against a clerk of a municipality for omitting names from the collectors' roll.—Non-averment of negligence. See *The Corporation of the Town of Peterborough v. Edwards*, 31 C. P. 231, p. 27.

Negligence in investing money. See *Carter v. Hatch*, 31 C. P. 293, p. 391.

Liability of master for acts of fellow-servants. See *Drew v. The Corporation of the Township of East Whitby*, 46 Q. B. 107, p. 450.

The defendants were the owners of a building on the street. A pipe, connected with the eave troughs, conducted the water from the roof down the side of the building, and by means of a spout discharged it upon the sidewalk, where in the winter it was formed into a ridge of ice, upon which the female plaintiff slipped and fell while walking on the street, and injured herself. The jury found that the defendants did not know of the accumulation of ice, and that they ought not reasonably to have known of it:—Held, Armour, J., dissenting, that the defendants were not liable. Per Hagarty, C. J., the carrying of the water to the sidewalk was a harmless act; the action of the weather was the proximate cause of the accident, and the defendants not having knowingly allowed ice to accumulate were not responsible. Per Armour, J., the conducting of the water to the sidewalk was a wrongful act, of which the formation of ice on the sidewalk in winter was the natural, certain and well known result, and defendants were responsible. *Skelton et ux. v. Thompson et al.*, 3 O. R., Q. B. D. 11.

Alteration of note.—Negligence of maker. See *Swaisland v. Davidson et al.*, 3 O. R. 320, p. 75.

A surveyor in making a survey is under no statutory obligation to perform the duty, but undertakes it as a matter of contract, and is liable only for damages caused by want of reasonable skill, or by gross negligence. The defendant, a provincial land surveyor, who was employed by the plaintiffs to run certain lines for road allowances, proceeded upon a wrong principle in making the survey, and the plaintiffs sued him for damages which they had paid to persons encroached upon by opening the road according to his survey:—Held, reversing the judgment of the Common Pleas (31 C. P. 77), that the plaintiffs could not recover as although the survey was made by defendant on an erroneous principle the evidence failed to prove that the lines as run by him were not correct. Quære, per Patterson, J. A., whether the fact that the plaintiffs knew that the correctness of the survey was questioned before opening the road did not make them guilty of contributory negligence. *Corporation of the Township of Stafford v. Bell*, 6 A. R. 273.

A petition of right does not lie to recover compensation from the Crown for damage occasioned by the negligence of its servants to the property of an individual using a public work. *The Queen v. McFarlane et al.*, 7 S. C. R. 216.

IV. DAMAGES RECOVERABLE.

1. Actions by Representatives of Persons Killed by Negligence.

The plaintiff sued under Lord Campbell's Act on behalf of himself and his children for the death of his wife occasioned by the defendants. The wife had some separate estate from which she derived an income but the jury allowed no damages in respect thereof. It was not shewn that the wife afforded any pecuniary assistance either to her husband or her children. The jury found for the plaintiff and apportioned the damages amongst the plaintiff and some of his children:—Held (Armour, J. dissenting) that the verdict was wrong; for the plaintiff was not entitled either for himself or the children to recover compensation for any thing but pecuniary loss or the loss of a reasonable probability of pecuniary benefit. Per Armour, J., the loss to be compensated is the loss of some benefit or advantage capable of being estimated in money as distinguished from a solatium for wounded feelings and loss of companionship; and the loss to the husband of the wife's performance of her household duties and to the children of a mother's education are both losses which can be estimated by a jury. *Lett v. The St. Lawrence and Ottawa R. W. Co.*, 1 O. R., Q. B. D. 545.

See *Gibson v. Midland R. W. Co.*, 2 O. R. 658, p. 72; *In re The Garland Monaghan v. Horn*, 7 S. C. R. 409, p. 447.

NEW TRIAL.

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I. IN WHAT CASES.

1. *Controverted Elections.*

Charges of corrupt practices, consisting of promises of money and of employment, were made against the respondent and one M., his agent. Both the respondent and his agent denied making any promises of money, but left the promises of employment unanswered; and the judge trying the petition (Draper, C. J. A.) so found, and avoided the election. Thereupon the respondent appealed to the court of appeal, and under 38 Vict., c. 3, s. 4, offered further evidence by affidavit, specifically denying any offer or promise, directly or indirectly, of employment. Draper, C. J. A., who tried the petition, having intimated to the court that had the respondent and his agent made the explicit denial as to offers of money or employment which it appeared they had intended making, he would have found for the respondent:—Held, under these circumstances, that the finding of the election court should be set aside, and that a new trial should be held before another judge on the rota. *Peel Election (Ont.)—Hurst v. Chisholm*, 1 H.E.C. 485.

2. *Defamation.*

The defendant spoke of the plaintiff, a miller and grain buyer, that one of the big millers (meaning the plaintiff) had run away owing money to him and others: that he, the defendant, had come in to catch the plaintiff, but that he had gone or cleared out. At the trial a nonsuit was entered, on the objection that the words were not shewn to have been used with reference to the plaintiff's business, and no special damage was proved:—Held, that the nonsuit was wrong, for the words used cast an imputation upon the solvency and financial standing of the plaintiff, and it was for the jury to say whether they were spoken in reference to his business, and calculated to injure him therein. *Lott v. Drury*, 1 O. R., Q. B. D. 577.

3. *Interpleader.*

Where there has been a trial by jury in an interpleader issue directed from the Chancery Division an application for a new trial must be made to the Divisional Court and not to a single judge. *Cole v. Campbell*, 9 P. R. 498.—Boyd.

4. *Malicious Arrest or Prosecution.*

In July, 1878, on returning with the defendant from cashing a draft which the plaintiff had received from Scotland, the plaintiff boasted to defendant that he was going to get very much larger remittances in May, 1879, and 1880, but there was nothing to shew that that statement was made with a view to obtaining credit. Nearly the whole of the proceeds of the draft, after paying defendant an account then due for

goods obtained, was deposited with the defendant, the plaintiff continuing to deal with him until not only the whole of the sum was absorbed, but a further indebtedness had been incurred. The defendant caused a warrant to be issued to arrest the plaintiff for obtaining goods under false pretences, though with the real object of obtaining a settlement of his account. After the plaintiff was arrested and brought before the magistrate he was allowed to go on his own recognizance to appear next day, but being unwell he could not appear, and the charge not being pressed by the defendant, and the magistrate not thinking there was sufficient evidence to commit, the matter was allowed to drop:—Held, that though the evidence shewed that the charge was not legally sustainable, yet, if the defendant acted bona fide, which was a matter for the jury, he would be justified in prosecuting:—Held, also, that it sufficiently appeared that the prosecution had terminated. The warrant was issued in the united counties of Northumberland and Durham and was endorsed by the magistrate in the county of Peterborough, "This is to certify that I have endorsed this warrant, to be executed in the county of Peterborough," but there was no proof of the handwriting of the justice who issued the warrant, or recital of such proof, as required by 32-33 Vict. c. 30, s. 23, D., Sched. K.:—Held, that the warrant was therefore defective and the arrest illegal, for which defendant was liable in trespass. Under the circumstances, a verdict having been entered for the defendant, a new trial was ordered. *Reid v. Maybee*, 31 C. P. 384.

In an action for malicious prosecution, on the opening of the defence the defendant was called, and stated that he had learned some facts from certain persons upon which he had caused the plaintiff to be arrested; but on proceeding to state what he had heard, the learned judge ruled that this was inadmissible, and that the persons who had told him these facts should first be called. They were then called and examined, and afterwards the defendant gave his evidence as to what they had told him. The jury found a verdict for plaintiff with \$500 damages:—Held, that the evidence was improperly rejected when offered; but, Armour, J., dissenting, that as it had afterwards been received, no substantial wrong or miscarriage having been occasioned by the ruling, and the verdict being satisfactory, a new trial should be refused under sec. 289 of the C. L. P. Act. *Bernard v. Coutellier*, 45 Q. B. 453.

In an action for malicious prosecution the want of reasonable and probable cause does not necessarily establish that malice which is requisite to maintain the action. Therefore where the jury were directed, in the course of the charge, that if a person makes a charge against another for the purpose of his being arraigned upon it without being justified in point of law, then he does it maliciously: that they need not trouble themselves with a question of malice except as it might be inferred from want of reasonable and probable cause, and that if the information had been laid without proper cause the result would be that it was laid maliciously; and the plaintiff obtained a verdict of \$500:—Held, misdirection, for which a new trial should be granted. Per Hagarty, C. J., dissenting. Though the directions standing alone might be open to criti-

cism, the charge must be read as a whole; but as the jury were afterwards told repeatedly that they should find for defendant if they thought that he believed the matters sworn to in his information, there was no misdirection which would warrant interfering with the plaintiff's verdict. Where the damages are large, and to a great extent sentimental, this may well be considered in deciding whether there has been a substantial wrong caused by a clear misdirection. *Winfield v. Kean*, 1 O. R., Q. B. D. 193.

In an action for malicious prosecution, the information and warrant of commitment merely disclosed a civil trespass. The plaintiff was nonsuited at the trial. It appeared, however, that the defendants had not disclosed the whole facts to the magistrate, and that, at the hearing, on the plaintiff's solicitor objecting that no criminal offence was charged, one of the defendants said that in order to have the case investigated he would charge the plaintiff with stealing the oats. The statement of claim alleged that the defendants had charged the plaintiff with felony. The court set aside the nonsuit, and granted a new trial, with leave to the plaintiff to amend the statement of claim according to the facts. *Macdonald v. Henwood et al.*, 32 C. P. 433.

5. Actions for Negligence.

The plaintiff leased premises at the corner of Queen and Bathurst streets, which ran at right angles to each other, in Toronto. There was a main sewer on Queen street, with which plaintiff's private drain, constructed by the defendant's at the expense of the plaintiff's lessor, connected, and which had been extended westward. There was therein at or about Portland street, a wall said to be for the purpose of dividing the water and causing it to flow eastward and westward. There was a sewer on Bathurst street, south of Queen street. Subsequently and about four years before the action, a sewer was constructed on Bathurst street, north of Queen street. Into this sewer a creek was turned in which at times the water was six feet deep and a number of cross streets drained thereto. Within the four years before action, but never before the plaintiff's cellar had been flooded several times and the cause of this action was the flooding during a rain of eight or nine hours' duration. The plaintiff alleged originally defective construction of the sewers and negligence in not repairing, but simply proved the flooding and the above facts, and the jury found a verdict for him. A new trial was directed. *Armour, J.*, dissenting. *Noble v. The Corporation of the City of Toronto*, 46 Q. B. 519.

The servant of the plaintiff was in charge of an omnibus running to and from the station of the defendants' railway, and on the evening in question was attending at Georgetown station, at about ten feet from the track, but was unable to see along the railway in either direction by reason of houses intervening. By leaving the omnibus, however, and going to the track he could have seen an approaching train; but omitting to take this precaution, although aware that a freight train was then on the track near the crossing, he started off to cross it, and did not hear or see anything of the approaching train until within about four feet of him, when he was

unable to avoid it, and the omnibus and harness were considerably damaged. It was not shewn that the driver of the train had given any warning of its approach by sounding the whistle or bell on its nearing the part of the track where it crossed the road to the station. At the trial the plaintiff was nonsuited on the ground of the contributory negligence of the plaintiff's servant:—Held, on appeal, (reversing the judgment of the County Court,) that the question of contributory negligence had been improperly withdrawn from the jury, and that a new trial must be had in order to submit that question to them. *Bennett v. The Grand Trunk R. W. Co.*, 7 A. R. 470.

6. Seduction.

A defendant in seduction is not to be prejudiced in an application for new trial because his counsel has examined him as to his means, after having endeavoured to exclude such evidence. *Ferguson v. Veitch*, 45 Q. B. 160.

7. New Trial as to some Counts and Nonsuit as to others.

Where there were common counts, on which there was evidence for the jury, but the verdict certainly included some damages upon the special counts, a new trial was granted on the common counts, and a nonsuit as to the others. *Harper v. Davies*, 45 Q. B. 442.

II. FOR WHAT CAUSE.

1. Excessive Damages.

Where the damage consisted in cutting down some ten or twelve ornamental and shade trees growing on the highway, opposite to the plaintiff's land, for which he was awarded \$150:—Held, not excessive. *Douglas v. Fox et al.*, 31 C. P. 140.

In an action of trespass to a certain lot of land and expulsion of the plaintiff therefrom, the plaintiff claimed \$500, the jury assessed the damages at \$1500 and the learned judge at the trial amended the statement of claim accordingly:—Held that the damages were excessive, and a new trial was granted. *Robinson v. Hall*, 1 O. R., Q. B. D. 266.

In an action for breach of a warranty on the sale of a piano:—Held that the proper measure of damages to allow was the price which at the time of sale would have been required to remove the alleged defect, and the jury having given much more, the court named a sum to which the plaintiff might reduce his verdict, or that there should be a new trial. *McMullen v. Williams*, 5 A. R. 518.

See *Winfield v. Kean*, 1 O. R. 193, p. 501.

2. Surprise at Trial.

Held, that the abstaining of a party from proof under the idea that the opposite party has no real intention of putting him to such proof, and being thereby taken by surprise, is not ground for granting a new trial. *Andrew v. Stuart et al.*, 6 A. R. 499.

New hearing on ground of surprise. See *Sher-ritt v. Beattie*, 27 Chy. 492.

3. Discovery of New Evidence.

See *Dumble v. The Cobourg and Peterborough R. W. Co.*, 29 Chy. 121; *Murray et al. v. The Canada Central R. W. Co.*, 7 A. R. 646.

4. Improper Admission of Evidence.

See *Cook v. Grant*, 32 C. P. 511, p. 504.

5. Improper Rejection of Evidence.

Held, that to an action by an assignee of an account for the price of lumber and staves delivered by the assignor to the defendant under two certain contracts therefor, the defendant, under R. S. O. c. 116, ss. 7, 10, and the Judicature Act, ss. 12, 16, and Rule 127, can set up as a defence a claim for damage for the non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior quality of those delivered. Per Osler, J. His right to do so depended wholly upon R. S. O. c. 116, s. 10. In this case the learned judge, at the trial, having refused to entertain the former defence, a new trial was ordered. *The Exchange Bank v. Stinson*, 32 C. P. 158.

In an action on a bond against two sureties, the defendant R. set up the defence and gave evidence that his signature to the bond had been obtained by fraud. The evidence of his co-defendant C., was tendered for the purpose of shewing that C.'s signature to the bond had also been so obtained, which was rejected as inadmissible:—Held, that the evidence of C. was admissible as shewing a fraud practised on him, with respect to the same instrument by the same person, and at or about the same time as the alleged fraud on R., and because it was confirmatory of R.'s evidence; and a new trial was ordered. *The Waterloo Mutual Ins. Co. v. Robinson et al.*, 4 O. R., Q. B. D. 295.

See *Bernard v. Coutellier*, 45 Q. B. 453, p. 500.

6. Non-Direction of Judge.

An entry upon land under assertion of right and a verbal submission by the occupant and consent to remain as tenant to the owner, create a new tenancy at will, and give a fresh point of departure under the statute of limitations. Where the attention of the jury had not been sufficiently called to the question whether this took place on the premises a new trial was granted. *Smith v. Keown et al.*, 46 Q. B. 163.

7. Misdirection of Judge.

In an action of trover or conversion against appellant, high sheriff of the county of Cumberland, N. S., to recover damages for an alleged conversion by the appellant of certain personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were a denial of the conversion, no property in plaintiff, no possession or right of pos-

session in plaintiff and justification under a writ of execution against the execution debtor. The learned judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shewn the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence":—Held, that the sheriff was entitled under his pleas to have it left to the jury to say whether the plaintiff had shewn title or right of possession to the goods in question, and therefore there was misdirection. *McLean v. Hannon*, 3 S. C. R. 706.

See *Winfield v. Kean*, 1 O. R. 193, p. 501; *Campbell v. Prince*, 5 A. R. 330, *infra*.

8. Where Verdict is Against Evidence or the Weight of Evidence.

(a) Where Forgery is Alleged.

An action against the endorser of promissory notes, who alleged that his endorsement had been forged, was tried twice. On the first trial the jury disagreed, and on the second they found for the plaintiff. No expert evidence was offered at either trial, though the defence intended was fully known. The court refused a new trial moved for on affidavits of an expert giving his opinion founded on a comparison and critical analysis of the defendant's handwriting, with the endorsements. *Moser v. Snarr*, 45 Q. B. 428.

(b) Where Verdict does Substantial Justice.

The plaintiff claimed to recover against the defendant, as administrator of his deceased brother W. G., two sums, one of \$800, which she alleged W. G. received for her from another brother, S. G., also deceased; and the other of \$1,500, which she alleged W. G. promised to leave her in consideration of her remaining with him, taking care of, and managing his house as long as he lived. It was objected that evidence was admitted of statements made by S. G. of the amount he intended leaving the plaintiff. The objection was first taken during the examination of a witness, C., after the plaintiff had been examined and cross-examined as to such statements without objection:—Held, that no substantial wrong or miscarriage was occasioned by the admission of C.'s evidence; and therefore under the O. J. Act, Rule 311, it was not a ground for a new trial. *Cook v. Grant*, 32 C. P. 511.

See *Bernard v. Coutellier*, 45 Q. B. 453, p. 500.

(c) Other Cases.

This case, being an action for an assault against a public officer, in which the jury had found a verdict for \$100, and a new trial asked for on the ground that the verdict was against evidence was refused, the Court of Appeal granted a new trial, as the evidence strongly preponderated in the defendant's favour and there was reason to believe the jury had been misled by the charge. *Campbell v. Prince*, 5 A. R. 330.

Upon a rule nisi calling upon the plaintiff in an action upon a policy of life insurance to shew cause why a verdict obtained by her should not be set aside and a nonsuit or verdict entered for the defendant pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendant; and for misdirection in that the jury had not been directed on the evidence to find for the defendant; the Court of Queen's Bench for Ontario, 41 Q.B. 197, ordered the verdict for the plaintiff to be set aside and the same to be entered for the defendant, while the Supreme Court eventually reversed this order and restored the verdict for the plaintiff, being of opinion that they had no power to direct a new trial on the ground of the verdict being against the weight of evidence:—Held, that although the Court of Queen's Bench would have had power to enter the verdict in accordance with what they deemed to be the true construction of the findings coupled with other facts admitted or beyond controversy, they had no power to set aside the verdict for the plaintiff and direct a verdict to be entered for the defendant in direct opposition to the finding of the jury on a material issue. Under 38 Vict. c. 11 Dom., the Supreme Court has power to make any order or to give any judgment which the court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power is not taken away by s. 22 in this case, in which the court below did not exercise any discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject. *Connecticut Mutual Life Ins. Co. of Hartford v. Moore*, 6 App. Cas. 644; 6 S. C. R. 634; 3 A. R. 230.

Although the Privy Council have the right, if they think fit, to order a new trial on any ground, that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it. *Id.*

See *Baillie v. Dickson*, 46 Q. B. 167, p. 77.

9. To Amend Pleadings.

A part of the claim in this case extended beyond six years, but no application was made at the trial for leave to plead the Statute of Limitations as to this. The court, under the circumstances, refused to grant a new trial to enable this defence to be set up. *Cook v. Grant*, 32 C. P. 511.

The plaintiff consigned goods to parties in England and shipped them by defendant companies on bills of lading, describing them as shipped by the plaintiff to be delivered to —, order, or his assigns, he or they paying freight. The plaintiff endorsed the bill of lading to various parties in England to whom he had sold the goods, the consignees paid the drafts drawn upon them for the price, and the goods having been seriously damaged in transit they made claim upon the plaintiff for the loss. The plaintiff now sued for the damage and was nonsuited on the

ground that he had not sufficient interest, or was not the proper person to sue. The court, without deciding as to the plaintiff having no right of action, or the effect of R. S. O. c. 116, s. 5, set aside the nonsuit and directed a new trial, with leave to the plaintiffs to add as co-plaintiffs, any or all of the consignees, or endorsees of the bills of lading, the evidence already given to stand, with any additions the parties might desire, reserving all costs. *Hately v. Merchants Despatch Co. et al.*, 2 O. R., Q. B. D. 385.

The validity of R. S. O. c. 116, s. 5, was disputed on the ground that it was ultra vires as interfering with trade and commerce, but the court refused to decide the point without notice to the attorney-general and minister of justice under 46 Vict. c. 6, s. 6, O., which would involve great delay, and adopted the above course as being the speediest and least expensive. *Id.*

III. ON WHAT TERMS.

Where an indictment for obstructing a highway had been removed by certiorari, at the instance of the private prosecutor, into this court, and defendant had been acquitted:—Held, that there was no power to impose payment of costs on such prosecutor. The court, however, has power to make payment of costs a condition of any indulgence granted in such a case; such as the postponement of the trial, or a new trial. *Regina v. Hart*, 45 Q. B. 1.

IV. DETERMINING QUESTION IN DISPUTE ON MOTION FOR NEW TRIAL.

Under Rule 321, O. J. Act., the court may, upon motion for judgment or for a new trial, if satisfied that it has before it all the materials necessary for finally determining the question in dispute * * * give judgment accordingly; but per Wilson, C. J., unquestionably that power must be most sparingly and cautiously exercised. *Stewart et al. v. Rounds*, 7 A. R. 515.

V. APPEAL IN APPLICATIONS FOR NEW TRIAL.

Although the jurisdiction of the Court of Appeal is not limited in appeals from the County Court as it is in appeals from the Superior Courts, under sec. 18, sub-s. 3, of the Appeal Act, it will not in ordinary cases interfere where a new trial has been refused by the County Court upon a matter of discretion only. *Campbell v. Prince*, 5 A. R. 330.

Where a County Court Judge granted a new trial owing to his dissatisfaction with the verdict the court refused to interfere with his discretion as it did not appear that he was clearly wrong. *Hunter v. Vanstone*, 6 A. R. 337.

In an action for negligence in not keeping a road in repair, the jury found for the plaintiff. A rule nisi having been subsequently obtained to enter a nonsuit, or for a new trial, this court made it absolute to enter a nonsuit. On appeal the court allowed the appeal, (6 A. R. 181) but made no order as to that portion of the rule nisi in which a new trial was asked, leaving it to be disposed of by this court:—Held, that the rule

nisi was completely and finally disposed of, so far as this court was concerned, by the rule to enter a nonsuit, which the defendants, by taking it without asking for any reservation so far as regarded the new trial had acquiesced in:—Held, also, Wilson, C. J., dissenting, that the Court of Appeal have no power, under sec. 23 of the Court of Appeal Act, R. S. O. c. 38, to direct this court to reopen the rule or reconsider the question whether, in their discretion, a new trial should be granted. *Walton et ux. v. The Corporation of the County of York*, 32 C. P. 35.

The plaintiff being in possession of land as tenant of H. was evicted by the defendant, who claimed under an overdue mortgage. A nonsuit was entered at the trial, on the ground that the defendant was at law entitled to possession, evidence of equitable right to possession in the plaintiff having been refused. The Court of Queen's Bench in its discretion granted a new trial. On appeal to the Court of Appeal:—Held, that the Court could not interfere. *Robinson v. Hall*, 6 A. R. 534.

VI. MISCELLANEOUS CASES.

The plaintiff was permitted to proceed with a new trial pending an appeal, where he shewed that he had already been inconvenienced by delay, that further delay would prejudice him financially, and that by it he might lose important oral evidence. *McDonald v. Murray et al.*, 9 P. R. 464.—*Winchester, Registrar Q. B. D.*—Hagarty.

The court below dismissed a bill filed to enforce a claim for damages sustained by an excessive valuation of land by the brother and partner of the paid valuator duly appointed by the plaintiffs, on the ground that it was not shewn that the valuation was made fraudulently. This Court, while differing from such view, declined to reverse the decree and ordered a new trial, at which the evidence of one of the defendants already taken might be used, in the event of his then being out of the jurisdiction; but ordered the defendants to pay the costs of the appeal; the new trial to be without costs in the court below. *The Canada Landed Credit Co. v. Thompson et al.*, 8 A. R. 696.

See *Creighton v. Chittick et al.*, 7 S. C. R. 348, p. 56; *Connecticut Mutual Life Ins. Co. of Hartford v. Moore*, 6 App. Cas. 644, p. 505.

NEXT FRIEND.

See HUSBAND AND WIFE.

NEXT OF KIN.

See DISTRIBUTION OF ESTATE.

NON JOINDER OF PARTIES.

See PLEADING.

NONSUIT.

NEW TRIAL AS TO SOME COURTS AND NONSUIT AS TO OTHERS—See NEW TRIAL.

The verdict herein was set aside by the county court, and a nonsuit entered upon a ground not taken as a defence at the trial or in the rule nisi:—Held, reversing the judgment that the learned judge erred in giving effect to the objection, which, if taken at the trial, would have been met by an amendment. As the evidence shewed that the plaintiff was entitled to succeed upon the merits, the appeal was allowed and the rule in the court below discharged. *Clarke et al. v. Barron*, 6 A. R. 309.

In an action on a life policy tried before a judge and a jury, in accordance with the provisions of 37 Vict. c. 7, s. 32, Ont., the learned judge, in place of requiring the jury to render a general verdict, directed them to answer certain questions, and the jury having answered all the questions in favour of the plaintiff, the judge entered a verdict for the plaintiff. Upon a rule nisi to shew cause why this verdict should not be set aside and a non-suit or a verdict entered for defendants pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendants, the Court of Queen's Bench (41 Q. B. 497) made the rule absolute to enter a verdict for the defendants. The appellant then appealed to the Court of Appeal for Ontario, and the court being equally divided, the appeal was dismissed (3 A. R. 331). Per Gwynne, J., that the plaintiff never could have been non-suited in virtue of 37 Vict., c. 7, s. 33, Ont., as it is only where it can be said that there is not any evidence in support of the plaintiff's case, that a non-suit can be entered; and that in this case, the proper verdict which the law required to be entered upon the answers of the jury was one in favour of the plaintiff. *Moore v. The Connecticut Mutual Life Ins. Co., of Hartford*, 6 S. C. R. 634. See S. C. 6 App. Cas. 644, p. 505.

NON USER.

Per Hagarty, C. J.:—Semble, that upon the defendants ceasing to use the lands for the purpose of a railway station, for which alone they had been conveyed, the grantor would be at liberty to resume possession. *Jessup v. The Grand Trunk R. W. Co.*, 7 A. R. 128.

NOTICE.

- I. OF DISHONOUR—See BILLS OF EXCHANGE AND PROMISSORY NOTES.
- II. OF ALLOTMENT OF STOCK AND CALLS—See CORPORATIONS.
- III. TIME FOR APPEALING AND NOTICE—See COURT OF APPEAL.
- IV. TO PRODUCE—See EVIDENCE.
- V. NOTICE FOR JURY—See JURY.
- VI. NOTICE OF MOTION—See JUDGMENT—PRACTICE.

VII. IN PROCEEDINGS ON MORTGAGES—See MORTGAGE.

VIII. PUBLICATION AND NOTICE OF BY-LAWS—See MUNICIPAL CORPORATIONS.

IX. TERMS NOTICE—See PRACTICE.

X. OF TRIAL—See TRIAL.

XI. BY REGISTRATION OF INSTRUMENTS—See REGISTRY LAWS.

To an action for the non-delivery of goods the defendants set up that they duly carried and delivered the said goods to the plaintiff, but that the plaintiff did not, as required by one of the terms of the special contract entered into between the parties, give the defendants within thirty-six hours thereafter notice of any damage or loss, &c.:—Held, that the defence failed, as the evidence shewed that the goods were never carried or delivered as alleged. *Steele v. Grand Trunk R. W. Co.*, 31 C. P. 230.

Purchase of land with notice of will destroyed, but not registered. See *Re Davis*, 27 Chy. 199.

Notice required in case of expulsion of members of a corporation. See *Cannon v. The Toronto Corn Exchange*, 5 A. R. 268, p. 146; *Marsh v. Huron College*, 27 Chy. 605, p. 146; *L'Union St. Joseph de Montreal v. Lapierre*, 4 S. C. R. 164, p. 177.

Notice of meeting of directors of corporation. See *McLaren et al. v. Fiske et al.*, 28 Chy. 352, p. 141.

The notice of the party resigning the office of councillor for a village to which he had been elected, stated that he resigned his "seat" in the council:—Held, sufficient; and that the plaintiff was entitled to his costs, although the Municipal Act requires notice of a resignation of the "office" to be given. *Smith v. Petersville*, 28 Chy. 599.

The notice of intention to pass a by-law to close a road should state the day on which the municipal council intend considering the by-law. In *re Birdsall et al.*, and the Corporation of the Township of Asphodel, 45 Q. B. 149.

Notice of alteration in promissory note. See *Swaisland v. Davidson et al.*, 3 O. R. 320, p. 75.

Notice to solicitor, notice to client. See *Brown v. Sweet*, 7 A. R. 725; *The Real Estate Investment Co. v. The Metropolitan Building Society*, 3 O. R. 476.

Held, that the defendant in this case having notice of an actual travelled way across his land was affected also with notice of the origin as well as the existence of the right. *Dixon v. Cross*, 4 O. R., Chy. D. 465.

NUISANCE.

I. INJUNCTION TO RESTRAIN—See INJUNCTION.

II. POWERS AND DUTIES OF MUNICIPALITIES—See MUNICIPAL CORPORATIONS.

Railways on highways—Acquiescence of Municipal Council. See *The Corporation of the Township of Pembroke v. The Canada Central R. W. Co.*, 3 O. R. 503.

OATH.

I. AFFIDAVITS—See AFFIDAVIT.

II. OF ALLEGIANCE—See ALIEN.

OFFICE AND PUBLIC OFFICERS.

PRESUMPTIONS ARISING FROM OFFICIAL APPOINTMENTS AND ACTS—See EVIDENCE.

Per Ritchie, C. J., neither the engineer nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of Canada have any power or authority, express or implied, under the law to bind the crown to any contract or expenditure not specially authorized by the express terms of contract duly entered into between the crown and the contractor, according to law, and then only in the specific manner provided for by the express terms of the contract. *O'Brien v. The Queen*, 4 S. C. R. 329.

Held, that R. S. O. c. 189, which forbids the profanation of the Lord's day by persons carrying on their ordinary business, does not apply to persons in the public service of Her Majesty, and therefore a conviction of a government lock-tender on the Welland Canal, for locking a vessel through the canal on Sunday, in obedience to the orders of his superior, was quashed. *Regina v. Berriman*, 4 O. R., Q. B. D. 282.

Purchase by township clerk of lands at tax sale. See *Beckett v. Johnston*, 32 C. P. 301, p. 29.

Action for assault against a public officer.—New trial. See *Campbell v. Prince*, 5 A. R. 330, p. 171.

Action for slander against public officer.—Privileged communication. See *Dewe v. Waterbury*, 6 S. C. R. 143, p. 206.

OIL LANDS.

Right of Tenant to bore for oil. See *Lancey v. Johnston*, 29 Chy. 67, p. 346.

ORDERS.

I. OF JUDGE—See PRACTICE.

II. TO PRODUCE—See EVIDENCE.

ORDERS IN COUNCIL.

Magistrate cannot take judicial notice of. See *Regina v. Bennett*, 1 O. R. 445, p. 242.

ORDNANCE LANDS.

Rights of Northern Railway over ordnance lands in the vicinity of Toronto. See *The Grand Trunk R. W. Co. of Canada v. The Credit Valley R. W. Co. of Canada*, and *The Northern R. W. Co. of Canada*, 27 Chy. 232, p. 194.

OTTAWA (CITY OF).

Easterly boundary of. See *Regina v. The Corporation of the County of Carleton*, 1 O. R. 277.

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See LANDLORD AND TENANT.

PARENT AND CHILD.

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II. LIABILITY OF PARENT FOR DEBTS OF CHILD, 511.

III. UNDUE INFLUENCE—See FRAUD AND MISREPRESENTATION.

IV. ACTION BY PARENT FOR DEATH OF CHILD FROM NEGLIGENCE—See NEGLIGENCE.

V. SEDUCTION OF CHILD—See SEDUCTION.

VI. INFANTS—See INFANT.

VII. FARMERS' SONS—See PARLIAMENTARY ELECTIONS.

VIII. ILLEGITIMATE CHILD—See BASTARD.

I. TRANSACTIONS BETWEEN.

The defendant in 1871 wrote to his son, who had left home to work for himself, that if he would return he would give him 50 acres of his farm and a share of the cattle and sheep when the plaintiff got married, but if he stayed away he would sacrifice his own and his father's interests. Upon receipt of the letter the plaintiff returned and remained on the farm working it with his father, except at certain times when he went away to work for wages for himself. It was proved that the father had pointed out the 50 acres which he intended to give his son, and the son entered and erected a house thereon with his father's approval, and occupied it with his family, he having married in 1879:—Held, that the plaintiff was entitled to specific performance of this agreement. *Garson v. Garson*, 3 O. R., C. P. D. 439.

Money lent by son—Bona fides. See *Jack v. Greig*, 27 Chy. 6, p. 292.

See also *Danferd v. Danferd*, 8 A. R. 518.

II. LIABILITY OF PARENT FOR DEBTS OF CHILD.

Plaintiff, upon their order furnished to several of defendant's sons, who were at the time living with their father, certain articles of wearing apparel, charging the same to defendant, and delivering them at his house. Previously to this defendant had caused to be inserted once in one of the daily papers published in the place, and taken in by the person by whom plaintiff was employed, a notice to the effect that he would not be responsible for any debt contracted in his name from that date without his written order, but after the goods in question had been furnished to his sons, he wrote to the plaintiff

stating that he would not in any way be responsible for any debt incurred by any of his sons from and after that date unless under his written order:—Held, that in the absence of evidence repelling the presumption of defendant's authority to his sons to contract the liability in his name, the fact of the delivery of the articles at the defendant's house for his sons, and the language of his letter to plaintiff were quite sufficient to justify the jury in finding defendant liable, and that it was not necessary to go further and prove the infancy of the sons. *Hayman v. Heward*, 18 C. P. 353.

PARLIAMENT.

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PARLIAMENTARY ELECTIONS.

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I. LAW GOVERNING ELECTIONS.

The common law of England relating to parliamentary elections is in force in Ontario, and applies to elections for the House of Commons. *Cornwall Election (Dom.)*.—*Bergin v. Macdonald*, 1 H. E. C. 547.

The Dominion Elections Act of 1874 does not affect the rights of parties in pending proceedings, which must be decided according to the law as it existed before the passing of that Act; s. 20 of that Act referring to candidates at some future election. *North Victoria Election (Dom.)*.—*Cameron v. Maclellan*, 1 H. E. C. 584; 10 C. L. J. 217. See the next case.

II. ELECTION OF MEMBERS.

1. *Property Qualification of Candidates.*

Held, as in the last case, that the Dominion Elections Act of 1874 not being retrospective, the question of property qualification of candidates at elections held before the passing of the Elections Act of 1873, can still be raised in pending cases. *Cardwell Election (Dom.)*.—*Hewitt et al. v. Cameron*, 1 H. E. C. 644; 10 C. L. J. 230.

Held, that it is not necessary for an elector, demanding the property qualification of a candidate, to tender the necessary declaration for the candidate to make; the intention of the statute being that the candidate must prepare his own declaration. *Id.*

See *North Victoria Election (Dom.)*.—*Cameron v. Maclellan*, 1 H. E. C. 584, p. 564.

2. *Disqualification of Candidates.*(a) *Notice to Electors.*

The respondent, a postmaster in the service of the Dominion of Canada, became a candidate at an election held on the 14th and 21st March, 1871, and was elected. On the 11th March he resigned his office of postmaster, which was accepted by the Postmaster General on the 13th March. His accounts with the Post Office department were closed and his successor appointed after the election. Evidence of the notoriety of the alleged disqualification of the respondent was given, which was that such alleged disqualification was a matter of talk, and that all the people at the meeting for the nomination of candidates were supposed to be aware of the supposed difficulty as to such disqualification:—Held, that even if the respondent was disqualified for election, the judge could not on such evidence declare that the electors voting for the respondent had voted perversely, and had therefore thrown away their votes, so as to entitle the petitioner to claim the seat. *West York Election (Ont.)*.—*Grahame v. Patterson*, 1 H. E. C. 156.

(b) *Other Cases.*

An election was held in January, 1874, under the Act of 1873, at which the petitioner and the respondent were candidates, and at which the respondent was elected. This election was avoided on the ground of corrupt practices by agents of the respondent, committed without his knowledge or consent. A new election was held, under the Act of 1874, at which the petitioner and

the respondent were again candidates, when the respondent was again elected. Thereupon another petition was presented, charging that the respondent was guilty of corrupt practices at this last election; that he was ineligible by reason of the corrupt acts of his agents at the former election; that persons reported guilty of corrupt practices at the former election trial had improperly voted at the last election; and claiming the seat for the petitioner:—Held on preliminary objections, (1) That the two elections were one in law; and it was not material that they had been held under different Acts of Parliament. (2) That the respondent was not ineligible for re-election, as the corrupt practices of his agents at the former election had been committed without his knowledge or consent. *Cornwall Election* (2) (*Dom.*)—*Bergin v. Macdonald*, 1 H. E. C. 647; 11 C. L. J. 81. But see 38 Vict. c. 10, s. 5, D.

See also VII. 1, p. 560.

3. Nomination.

The nomination paper of B., one of the candidates at the election complained of, was signed by 25 persons, and had the affidavit of the attesting witness duly sworn to as required by the statute. The election clerk found that one of the 25 persons was not entered on the voters' lists, and thereupon the returning officer and election clerk compared the names on the nomination paper with the certified voters' lists in his possession, and on finding that only 24 of the persons who had so signed were duly qualified electors, he rejected B.'s nomination paper, and returned the respondent as member elect:—Held, (1) That as the policy of the law is to have no scrutiny, or as little as possible, in election cases, and to give the people a full voice in choosing their representatives, the defect in the nomination paper was one to which the returning officer should not have yielded, (2) That if the election had gone on the defect in the nomination paper would not, according to 37 Vict. c. 9, s. 80, have affected the result of the election. *South Renfrew Election* (2) (*Dom.*)—*McKay et al. v. McDougall*, 1 H. E. C. 705.

Semle, that the returning officer is both a ministerial and a judicial officer; and that he might decline to receive the nomination of persons disqualified by status or office, and also nomination papers signed by unqualified persons if he had good reasons for so doing. *Ib.*

4. Voters.

(a) Assessment Roll and Voters' List.

Special report, and observations on making the revised lists of voters final, except as to matters subsequent to the revision. *Stormont Election* (*Ont.*)—*Bethune v. Colquhoun*, 1 H. E. C. 21; 7 C. L. J. 213.

The name of the voter being on the poll-book is *prima facie* evidence of his right to vote. The party attacking the vote may either call the voter, or offer any other evidence he has on the subject. *Ib.*

A voter being duly qualified in other respects, and having his name on the roll and list, but by

mistake entered as tenant instead of owner or occupant, or vice versa:—Held, not disfranchised merely because his name was entered under one head instead of another. *Ib.*

The only question as to the qualification of a voter settled by the court of revision under the Assessment Act, is the one of value.—*Stewart's vote. Ib.*

Being rated as tenant instead of owner:—Held, not to affect the vote.—*Blair's vote. Ib.*

Where the voter had only received a deed of the property on which he voted on the 16th August, 1870, but previous to that date had been assessed for and paid taxes on the place, but had not owned it:—Held, that not possessing the qualification at the time he was assessed, or at the final revision of the roll, he was not entitled to vote.—*Cahey's vote. Ib.*

Where a voter properly assessed, who was accidentally omitted from the voters' list for polling division No. 1, where his property lay, and entered on the voters' list for polling division No. 2 voted in No. 1, though not on the list, his vote was held good.—*Little's vote. Brockville Election* (*Ont.*)—*Plint v. Fitzsimmons*, 1 H. E. C. 129.

A.'s name appeared on the assessment roll and voters' list as owner, but no property appeared opposite his name; just below A.'s name, the name of B. was entered as tenant, with certain property following it, but B.'s name was not bracketed with A.'s. Evidence was admitted to shew that A. owned the property next below his name, for which B. his tenant was assessed as tenant, and A.'s vote was held good.—*Baker's vote. Ib.*

Held, (1) That the proper list of voters to be used at an election is "the last list of voters made, certified, and delivered to the clerk of the peace at least one month before the date of the writ to hold such election." (2) That an irregular voters' list had been used in one of the townships in the electoral division; but that the result of the election had not been affected thereby, and that the election was not avoided. *Monck Election* (*Ont.*)—*Collier v. McCallum*, 1 H. E. C. 154.

Held, following the last case, that the list of voters to be used at an election must be the list made, certified and delivered to the clerk of the peace at least one month before the date of the writ to hold such election. The list of voters used at the election in the township of Hillier was not filed until the 28th November, 1871, and the writ of election was dated 9th December, 1871:—Held, that the list of voters of 1871 should not have been used, and the seat was thereupon awarded to the other candidate, he having obtained on a scrutiny a majority of the votes. *Prince Edward Election* (2) (*Ont.*)—*Dorland et al. v. McCuaig*, 1 H. E. C. 160.

The mistake of the number of the lot in the assessment roll does not come under the same rule as the mistake of a name, as the latter is provided for in the statute and the voter's oath. *South Grenville Election*, (*Ont.*)—*Ellis v. Fraser*, 1 H. E. C. 163.

Parol evidence is inadmissible on a scrutiny to alter the value assessed against property in the assessment roll.—*Stewart's vote. Ib.*

Where a voter was assessed for property which he sold on the 27th February, 1871, before the revision of the assessment roll, and was not assessed for other property of which he was in possession as owner or tenant, he was held not entitled to vote.—*Place's vote. Ib*

A person assessed for land he does not own, though receiving rent for it from a tenant, is not qualified to vote.—*Clark's vote.—Lincoln Election (2) (Ont.).—Pawling v. Rykert, 1 H.E.C. 500.*

A voter was assessed in two wards of a town; he parted with his property qualification in one of the wards, but voted in such ward:—Held, that the vote might be supported on the qualification in the other ward, which, if the voter had voted on it, would have made it necessary for him to vote in another polling division.—*Gibson's vote. Ib.*

Particulars for a scrutiny of votes were delivered by the respondent objecting to certain voters, as (1) aliens; (2) minors; (3) not owners, tenants or occupants of the property assessed to them; and (4) farmers' sons not residing with their fathers upon the farm, as required by law. On a motion to strike out such particulars:—Held, that under the "Voters' Lists Finality Act," (41 Vict. c. 21, s. 3), the legality of the votes so objected to could not be inquired into, and that the particulars should be struck out:—Held, further, that the effect of the said Act was to render the voters' lists final and conclusive of the right of all persons named therein to vote, except where there had been a subsequent change of position or status, by the voter having parted with the interest which he had (or by the assessment roll appeared to have) in the property, and becoming also a non-resident of the electoral division. *South Wentworth Election (Ont.).—Olmstead et al. v. Carpenter, 1 H.E.C. 531.*

The assessment roll is conclusive as to the amount of the assessment; but the mere fact of the name of a person being on the roll is not conclusive as to his right to vote. The returning officer is bound to record the vote if the person takes the oath, but that is not conclusive. *North Victoria Election (Dom.).—Cameron v. MacLennan, 1 H.E.C. 584; 10 C.L.J. 217.*

Mistakes in copying the voters' lists should not deprive legally qualified voters of their votes any more than the names of unqualified voters being on the list would give them a right to vote. But the mere fact that the lists were not correct alphabetical lists, or had not the correct number of the lot, or were not properly certified, or the omitting to do some act as to which the statute is directory, is no ground for setting aside an election, unless some injustice resulted from the omission, or unless the result of the election was affected by the mistake. *Ib.*

The court will not go behind the voters' list to inquire whether a voter's name was entered upon the assessment roll in a formal manner or not. *North Simcoe Election (Dom.).—Edwards v. Cook, 1 H.E.C. 617; 10 C.L.J. 232.*

The names of certain persons who were qualified to vote at the election appeared on the last revised assessment roll of the municipality, but were omitted from the voters' list furnished to the deputy returning officer, and used at the election. They tendered their votes at the poll, but

their votes were not received; and a majority of them stated to the deputy returning officer that they desired to vote for the petitioner. The petitioner had a majority without these votes:—Held, by the Court of Queen's Bench (affirming Wilson, J.), no ground for setting aside the election. Semble, per Wilson, J., That, though the only mode of voting is by ballot, if it became necessary to decide the election by determining the right to add these votes, it should be determined in that manner most consistent with the old law, and which would have saved the disfranchisement of electors, and the necessity of a new election. If the right of voting can only be preserved by divulging from necessity for whom the elector intended to vote, the necessity justifies the declaration the elector is forced to make, as there is nothing in the Act which prevents the elector from saying for whom he intends to vote. *North Victoria Election (2) (Dom.).—Cameron v. MacLennan, 1 H.E.C. 671; 11 C.L.J. 163; 37 Q.B. 234.*

The respondent was elected by four votes. At the election the names of 12 persons who were entered on the assessment roll as "freeholders," appeared on the voters' lists, owing to a printer's mistake, as "farmers' sons." Their votes were challenged at the poll, and they were required by the petitioner's scrutineers to take the farmers' sons' oath, which they refused. Subsequently they offered again to vote and to take the owners' oath, and the deputy returning officer, who was also clerk of the municipality, knowing them, gave them ballot papers and allowed them to vote:—Held, (1) that having been rightly entered on the assessment roll, the mistake as to their qualification on the voters' list did not disfranchise them. (2) That their refusal to take the farmers' sons' oath was not a refusal to take the oath required by law. A refusal to swear is where a voter refuses to take the oath appropriate to his proper description. (3) That having a right to vote, although they voted in a wrong capacity, their votes could not be struck off. Semble, That the provisions of the law as to how voters are to be entered on the voters' list in respect to their property, and as to the manner in which they are to vote, are directory. *Prescott Election (Dom.).—Hagar v. Routhier, 1 H.E.C. 780.*

Held, that the notice required by R.S.O. c. 9, s. 9, of a complaint of any error or omission in the voters' list must be signed by the voter giving the same or his agent. The name in the beginning is not a sufficient signature. *In re Simpson and the County Judge of Lanark, 9 P.R. 353.—Osler.*

Semble, That the question of the validity of the notice can be raised before the judge hearing the appeal, after it has been received and entered in the list of appeals, the clerk who receives and enters it having no judicial duty to perform. *Ib.*

The assessment roll of a municipality was finally revised and corrected by the Court of revision on the 31st May, 1882. The clerk of the municipality prepared the voters' list therefrom, and on the 7th September, 1882, posted a copy thereof in his office as required by R.S.O. c. 9, s. 3. He transmitted copies of the list to some, but not to all the persons entitled to receive them under secs. 3 and 4, and no complaints having

been received by him up to the 30th October, he on that day signed the certificate and report mentioned in sec. 11 of the Act, and obtained the certificate of the deputy judge of the County Court on three copies of the list as being the revised list of voters for the municipality. The judge of the County Court found that the clerk's certificate was false, and made with intent to deceive the deputy judge, and that the clerk had designedly withheld the lists; and he therefore set aside the clerk's certificate and the certificate of the deputy judge:—Held, that as soon as the list is posted up in the clerk's office the time for making complaints in respect of it begins to run; that such time being by sec. 9 expressly limited to 30 days from the posting up of the list, and no complaint having been made within it, the deputy judge was bound to certify; that the omission to transmit the copies, whether negligent or wilful, not being essential to the legal revision or authentication of the list, could not authorize an extension of the time, and that the deputy judge's certificate was final, and could not be set aside. *In re The Voters' List of the Village of L'Orignal, for the year 1882. In re Johnson*, 9 P. R. 425.—Osler.

(b) Voting and Marking Ballots.

One B., a voter who could neither read nor write, came into a polling booth, and in the presence of the deputy returning officer asked for one C. who was not present to give him instructions how to mark his ballot. The deputy returning officer gave the voter a ballot paper, who then stated he wished to vote for the respondent. One W., an agent of the respondent, in the polling booth, took the pencil and marked the ballot as the voter wished, and the voter then handed it to the deputy returning officer. No declaration of inability to read or write was made by the voter:—Held, that no one but the deputy returning officer was authorized to mark a voter's ballot, or to interfere with or question a voter as to his vote; and the deputy returning officer permitting the agent of a candidate to become acquainted with the name of the candidate for whom the voter desired to vote, violated the duty imposed on him to conceal from all persons the mode of voting, and to maintain the secrecy of the proceedings. *Halton Election (Ont.)—Bussell et al. v. Barber*, 1 H. E. C. 283.

Where a voter offered to vote at a poll, but did not ask for or put in a tendered ballot paper:—Held, that the Ballot Act required the vote to be given secretly, and that the parol declaration of the voter as to his vote could not be received in order to add it to the poll.—*Secord's vote. Lincoln Election (2) (Ont.)—Pawling v. Rykert*, 1 H. E. C. 500.

A voter who had inadvertently torn his ballot, and whose ballot was rejected on the counting of votes, was allowed his vote, the evidence proving that no trick was intended for the purpose of shewing how he intended to vote. *South Wentworth Election (Ont.)—Olmstead v. Carpenter*, 1 H. E. C. 531.

Freeholders who appeared on the voters' lists, owing to a printer's mistake, as farmers' sons, being challenged at the poll refused to take the farmers' sons' oath:—Held, that their refusal to

take such oath was not a refusal to take the oath required by law. A refusal to swear is where a voter refuses to take the oath appropriate to his proper description. *Prescott Election (Dom.)—Hagar v. Routhier*, 1 H. E. C. 780.

An elector duly qualified, who had been refused a ballot paper by the deputy returning officer, cannot be deprived of his vote; otherwise it would follow that because the deputy returning officer had wrongfully refused to give such elector a ballot paper, his vote would not be good in fact or in law. *North Victoria Election (2) (Dom.)—Cameron v. Maclellan*, 1 H. E. C. 671; 11 C. L. J. 163.

The following ballots were held valid: (1) Ballots with a cross to the right just after the candidate's name, but in the same column, and not in the column on the right hand side of the name. (2) Ballots with an ill-formed cross, or with small lines at the ends of the cross, or with a line across the centre or one of the limbs of the cross, or with a curved line like the blades of an anchor. *Id.*

The following irregularities held not to be fatal: (1) An irregular mark in the figure of a cross, so long as it does not lose the form of a cross. (2) A cross not in the proper compartment of the ballot paper, but still to the right of the candidate's name. (3) A cross with a line before it. (4) A cross rightly placed, with two additional crosses, one across the other candidate's name, and the other to the left. (5) A cross in the right place on the back of the ballot paper. (6) A double cross or two crosses. (7) Ballot paper inadvertently torn. (8) Inadvertent marks in addition to the cross. (9) Cross made with pen and ink instead of a pencil. *Monck Election (Dom.)—Grant et al. v. McCallum*, 1 H. E. C. 725; 12 C. L. J. 113.

In ballot papers containing the names of four candidates the following ballots were held valid: (1) Ballots containing two crosses, one on the line above the first name, and one on the line above the second name valid for the two first named candidates. (2) Ballots containing two crosses, one on the line above the first name, and one on the line dividing the second and third compartments valid for the first named candidate. (3) Ballots containing properly made crosses in two of the compartments of the ballot paper with a slight lead pencil stroke in another compartment. (4) Ballots marked in the proper compartments thus Y. *Queen's County Election (Dom.)—Jenkins v. Brecken*, 7 S. C. R. 247.

The Election Act in its enacting part requires ballots to be marked with a cross on any place within the division which contains the name of the candidate. Ballots marked with a straight line within the division, or with a cross on the back, were rejected. Observations on the difference between the English and Ontario statutes in this respect. *South Wentworth Election (Ont.)—Olmstead et al. v. Carpenter*, 1 H. E. C. 531.

The following ballots were held invalid: (1) Ballots with a single stroke. (2) Ballots with the candidate's name written thereon in addition to the cross. (3) Ballots with marks in addition to the cross, by which the voter might be identified, although not put there by the voter in order that he might be identified. (4) Ballots marked with a number of lines. (5) Ballots with

a cross for each candidate. *North Victoria Election* (2) (*Dom.*)—*Cameron v. Maclellan*, 1 H. E. C. 671; 11 C. L. J. 163.

Quære, whether ballots with a cross to the left of the candidate's name should be rejected, as the deputy returning officer is not bound to reject such ballots under sec. 55 of the Dominion Elections Act, 1874. *Ib.*

The following irregularities in the mode of marking ballot papers, held to be fatal: (1) making a single stroke instead of a cross. (2) Any mark which contains in itself a means of identifying the voter, such as his initials or some mark known as being one used by him. (3) Crosses made at left of name, or not to the right of the name. (4) Two single strokes not crossing. *Monck Election* (*Dom.*)—*Grant et al. v. McCallum*, 1 H. E. C. 725; 12 C. L. J. 113.

The following ballots were held invalid: (1) Ballots with a cross in the right place on the back of the ballot paper instead of on the printed side. (2) Ballots marked with an *x* instead of a cross. *Queen's County Election* (*Dom.*)—*Jenkins v. Brecken*, 7 S. C. R. 247.

See also *Bothwell Election* (*Dom.*)—*Hawkins v. Smith et al.*, 8 S. C. R. 676.

(c) *Naturalized Subjects and Aliens.*

Where the voter was born in the United States, his parents being British-born subjects, his father and grandfather being U. E. Loyalists, and the voter residing nearly all his life in Canada:—Held, entitled to vote.—*Place's vote. Stormont Election* (*Ont.*)—*Bethune v. Colquhoun*, 1 H. E. C. 21; 7 C. L. J. 213.

An alien who came to Canada in 1850, and had taken the oath of allegiance in 1861, but had taken no proceedings to obtain a certificate of naturalization from the Court of Quarter Sessions, was held not qualified to vote.—*Bacon's vote. Brockville Election* (*Ont.*)—*Flint v. Fitzsimmons*, 1 H. E. C. 129

An alien, whose father had taken the oath of allegiance on obtaining the patent for his land under 9 Geo. IV., c. 21,—Held not qualified to vote. *Healey's vote. Ib.*

The evidence that the parents of a voter had stated to such voter that he was born in the United States, but that his father was born in Canada, received, and the vote held good.—*Wright's vote. Ib.*

Where evidence was given of parol admissions made by certain voters, some years before the election, that they had been born in a foreign country, and also evidence that since the parol admission the voters had voted at parliamentary elections, and had taken the voter's oath as to being British subjects by birth or naturalization:—Held, (1) That the oath at the polls could not be treated as testimony, not having been given in any judicial proceeding. (2) That by swearing at the polls he was a British subject by birth or naturalization, the voter only stated the legal result of certain facts. (3) That there was therefore no presumption of naturalization sufficiently strong to rebut the presumption of the continuance of the original status of alienage.—*Shenck's vote. Lincoln Election* (2) (*Ont.*)—*Pawling v. Rykert*, 1 H. E. C. 500.

Where a voter, in support of his own vote, swore that he was born in the United States but that his parents were British subjects:—Held, that the whole statement of the voter must be taken, and that it amounted to this: "I was born in the United States of British parents."—*Mulreman's vote. Ib.*

Certain aliens had taken the oaths of allegiance, &c., before a justice of the peace of a town, which oaths were administered to them in a township, but within the same county:—Held, that under the Alien Act, 34 Vict., c. 22, s. 2, (*Dom.*) the justice of the Peace, in administering the oaths, was acting ministerially and not judicially; and that the oaths were properly administered.—*Johnson's vote. Ib.*

(d) *Property Qualification.*

Husband and Wife.—Where the owner died intestate, and the husband of one of his daughters leased the property and received the rents, such husband was held not entitled to vote.—*Leslie's vote. Brockville Election* (*Ont.*)—*Flint v. Fitzsimmons*, 1 H. E. C. 129.

Where a husband had possession of a lot for which he was assessed as occupant and his wife as owner, but which belonged to the wife's daughters by a former husband his vote was held good.—*Whaley's vote. Ib.*

Parent and Son.—Where a father was by a verbal agreement "to have his living off the place," the son being owner and in occupation with the father, the father was held not entitled to vote.—*Wiltse's vote. Ib.*

Where it was proved that an agreement existed (verbal or otherwise) that the son should have a share in the crops as his own, and such agreement was bona fide acted on, the son being duly assessed, his vote was held good; the ordinary test being: had the voter an actual existing interest in the crops growing and grown? *Ib.*

But where such crops could not be seized for the son's debt, the son was held not entitled to vote.—*Francis' vote. Ib.*

Where the agreement did not shew what share in the crops the son was to have with his father, and it appeared to be in the father's discretion to determine the share, such son was held not entitled to vote.—*Johnson's vote. Ib.*

Where it was proved that for some time past the owner had given up the whole management of the farm to his son, retaining his right to be supported from the product of the place, the son dealing with the crops as his own, and disposing of them to his own use, the son's vote was held good.—*Caldwell, Moore and Smith's votes. Ib.*

The widow of an intestate owner continuing to live on the property with her children, who own the estate and work and manage it, should not, till her dower is assigned, be assessed jointly with the joint tenants, nor should any interest of hers be deducted from the whole assessed value. Where, therefore, four joint tenants and such doweress occupied property assessed for \$900, the joint tenants were held entitled to the qualification of voters.—*Gilroy's vote. Ib.*

Where the father had made a will in his son's favour, and told the son if he would work the place and support the family he would give it to him, and the entire management remained in the son's hands from that time, the property being assessed in both names, the profits to be applied to pay the debt due on the place:—Held, that as the understanding was that the son worked the place for the support of the family, and beyond that for the benefit of the estate, which he expected to possess under his father's will that he did not hold immediately to his own use and benefit, and was not entitled to vote.—*Weort's vote. Stormont Election (Ont.)—Bethune v. Colquhoun*, 1 H. E. C. 21; 7 C. L. J. 213.

Where the objection taken was, that the voter was not at the time of the final revision of the assessment roll the bona fide owner, occupant, or tenant of the property in respect of which he voted; and the evidence shewed a joint occupancy on the part of the voter and his father on land rated at \$240:—Held, that the notice given did not point to the objection that if the parties were joint occupants they were insufficiently rated, and as the objection to the vote was not properly taken, the vote was held good. The learned Chief Justice intimated that if the objection had been properly taken, or if the counsel for petitioner (whose interest it was to sustain the vote) had stated that he was not prejudiced by the form of the objection, he would have held the vote bad.—*Baker's vote. Ib.*

Where a certain occupancy was proved on the part of the son distinct from that of the father, but no agreement to entitle the son to a share of the profits, and the son merely worked with the rest of the family for their common benefit:—Held, that although the son was not merely assessed for the real but the personal property on the place, (his title to the latter being on the same footing as the former), he was not entitled to vote.—*Raney's vote. Ib.*

Where the voter and his son leased certain property, and the lease was drawn in the son's name alone, and when the crops were reaped the son claimed they belonged to him solely, the voter owning other property, but being assessed for this only and voting on it:—Held, that although he was on the roll and had the necessary qualification, but was not assessed for it, he was not entitled to vote.—*Hill's vote. Ib.*

Where father and son live together on the father's farm, and the father is in fact the principal to whom money is paid, and who distributes it as he thinks proper, and the son has no agreement binding on the father to compel him to give the son a share of the proceeds of the farm, or to cultivate a share of the land, but merely receives what the father's sense of justice dictates:—Held, the son has no vote.—*Eamon's vote. Ib.*

In a milling business where the agreement between the father and son was, that if the son would take charge of the mill, and manage the business, he should have a share of the profits, and the son, in fact, solely managed the business, keeping possession of the mill, and applying a portion of the proceeds to his own use:—Held, that the son had such an interest in the business, and while the business lasted, such an interest in the land, as entitled him to vote.—*Bullock's vote. Ib.*

Where the voter was the equitable owner, the deed being taken in the father's name, but the son furnishing the money, the father in occupation with the assent of his son, and the proceeds not divided:—Held, that being the equitable owner, notwithstanding the deed to the father, he had the right to vote.—*Blair's vote. Ib.*

Where the voter had been originally, before 1865 or 1866, put upon the assessment roll merely to give him a vote, but by a subsequent arrangement with his father, made in 1865 or 1866, he was to support the father, and apply the rest of the proceeds to his own support:—Held, that if he had been put on originally merely for the purpose of giving a vote, and that was the vote questioned, it would have been bad; but being continued several years after he really became the occupant for his own benefit, he was entitled to vote, though originally the assessment began in his name merely to qualify him.—*Gore's vote. Ib.*

Where a verbal agreement was made between the voter and his father in January, 1870, and on this agreement the voter from that time had exercised control, and took the proceeds to his own use, although the deed was not executed until September following:—Held, entitled to vote.—*Gollinger's vote. Ib.*

Where a father had made a will of a lot to his son who was assessed for it, and the son took the crops except what was used by the father, who resided on the lot with his wife, the son residing and working on another farm:—Held, that the son had not such a beneficial interest in the lot as would entitle him to vote.—*Mullin's vote. South Grenville Election (Ont.)—Ellis v. Fraser*, 1 H. E. C. 163.

Where a father, the owner of a lot, told his son that he might have the lot, and advised him to get a deed drawn, and the lot had been assessed to the son for three or four years, and was rented to a tenant by the father with the assent of the son, who paid to the father his wages but the father collected the rent:—Held, that as there was nothing but a voluntary gift from the father to the son, without possession, the son's vote was bad.—*Lundy's vote. Ib.*

Where the owner of mortgaged property died intestate, leaving a widow and sons and daughters, and the property was sold under the mortgage, and the deed made to the widow, but three of the sons furnished some of the purchase money and all remained in possession, and the eldest son was assessed as occupant:—Held, that as the eldest son did not shew that the property was purchased for him, and the presumption from the evidence being that it was bought for the mother, such eldest son had no right to vote.—*Morrow's vote. Ib.*

Partners and Joint Owners.]—Where a son was assessed at \$700 for a farm in which he and his father were partners, in the proportion of three-fourths of the profits to the father and one-fourth to the son, and the objection to the voter was non-ownership:—Held, that the partnership was established by the evidence, and in view of the objection taken, the vote was sustained.—*Smale's vote. Ib.*

Where two partners in business occupied premises, the freehold of which was vested in one

of them, and the assessment of the premises was sufficient to give a qualification to each, both partners were held qualified to vote.—*Fitzgerald's vote. Ib.*

Where one of two joint owners was assessed for property at \$200.—Held, that neither of such joint owners was entitled to vote. *Stewart's vote. Ib.*

Trustees.—A trustee under a will having no present beneficial interest in the real property assessed to him, was held not entitled to vote.—*Jones' vote. South Grenville Election (Ont.)—Ellis v. Fraser, 1 H. E. C. 163.*

Where A., who resided out of the riding, had made a contract in writing to sell to B. the property assessed to him as owner, but had not at the time of the election executed the deed, B. having been in possession of the property for several years under agreements with A.:—Held, that A., was a mere trustee for the purchaser, and had therefore no right to vote.—*Holden's vote. Ib.*

Tenants.—Where the voter was the tenant of certain property belonging to his father-in-law, and before the expiration of his tenancy the father-in-law, with the consent of the voter (the latter being a witness to the lease), leased the property to another, the voter's lease not expiring until November, and the new lease being made on the 28th March, 1870:—Held, that after the surrender by the lease, to which he was a subscribing witness, he ceased to be a tenant on the 28th of March, 1870, and that to entitle him to vote he must have the qualification at the time of the final revision of the assessment roll, though not necessarily at the time he voted, so long as he was still a resident of the electoral division.—*Rupert's vote. Stormont Election (Ont.)—Bethune v. Colquhoun, 1 H. E. C. 21; 7 C. L. J. 213.*

A tenant from year to year cannot create a sub-tenancy nor create a right to vote by giving another a share in the crops raised on the leased property.—*Dunham's vote. Brockville Election, (Ont.)—Flint v. Fitzsimmons, 1 H. E. C. 129.*

Where a man occupied a house as toll collector, and not in any other right, he was not qualified to vote.—*McArthur's vote. Ib.*

Where a vendor before the revision of the assessment roll had conveyed and given possession of the property to a purchaser, and such purchaser had afterwards given him a license to occupy a small portion of the property, such vendor was held not entitled to vote.—*Noblin's vote. South Grenville Election (Ont.)—Ellis v. Fraser, 1 H. E. C. 163.*

(e) Income Qualification.

A voter whose qualification is successfully attacked may shew a right to vote on income; but in such case he must prove that he has complied with all the requirements of the Act which are essential to qualify him to vote on income.—*Gray's vote. Lincoln Election (Ont.)—Pawling v. Rykert, 1 H. E. C. 500.*

(f) Disqualification.

The right to vote is not to be taken away or the vote forfeited by the act of the voter unless

under a plain and express enactment, for it is a matter in which others besides the voter are interested. *Brockville Election (Ont.)—Flint v. Fitzsimmons, 1 H. E. C. 139.*

Held, the fact of persons having been reported by the judge as guilty of corrupt practices at a former election, had not the effect of disqualifying them from voting at a second election. The report of the judge is not as to them an adjudication, for voters are not, in a proper judicial sense, parties to the proceedings at an election trial. *Cornwall Election (Dom.)—Bergin v. MacDonald, 1 H. E. C. 647; 11 C. L. J. 81.*

5. Marks on Ballots by Deputy Returning Officers.

The petitioner had received a majority of the ballots cast at the election; but on a recount before the county judge, certain ballots, with other marks on the back than the initials of the deputy returning officers, were rejected by the county judge, thereby giving a majority to the respondent. Evidence was given on the hearing of the petition that the deputy returning officers had, from a mistaken idea of their duty, placed the numbers of the voters, as marked in the voters' list, on the backs of the ballots:—Held, that under 42 Vict. c. 4, s. 18, the marks so made did not avoid the ballots, and that such ballots should now be counted. Semble, that the county judge, acting ministerially on the recount of ballots, could not have investigated by whom or for what motive such marks had been made on the ballots. *Russell Election (Ont.)—Baker v. Morgan, 1 H. E. C. 519.*

Certain deputy returning officers, before giving out ballot papers to the voters at the election in question, placed numbers on the ballots corresponding with the numbers attached to the names of such voters on the voters' lists:—Held, (1) That the deputy returning officers had acted contrary to law in numbering the ballots, and that the ballots so numbered should be rejected as tending to the identification of the voters. (2) That such conduct of the deputy returning officers having had the effect of changing the result of the election, a new election should be ordered. *East Hastings Election (Dom.)—Aylesworth v. White, 1 H. E. C. 764.*

The neglect or irregularities of a deputy returning officer in his duties under the Dominion Elections Act, 1874, will not invalidate an election, unless they have affected the result of the election or caused some substantial injustice:—Held, therefore, that the neglect of a deputy returning officer to initial the ballot papers, and to provide pen and ink instead of a pencil to mark them, would not avoid the election. *Monck Election (Dom.)—Grant et al. v. McCallum, 1 H. E. C. 725; 12 C. L. J. 113.*

On a recount before the County Court Judge, J., the appellant, who had a minority of votes according to the return of the returning officer, was declared elected, all the ballots cast at three polling districts, in which the appellant had polled only 131 votes and the respondent, B., 345, having been struck out on the ground that the deputy returning officer had neglected to place his initials upon the back of the ballot. On appeal to the Supreme Court of P. E. Island, it was proved that the deputy returning officer

had placed his initials on the counterfoil before giving the ballot paper to the voter, and afterwards, previous to his putting the ballot in the ballot box, had detached and destroyed the counterfoil, and that the ballots used were the same as those he had supplied to the voters, and Mr. Justice Peters held that the ballots of the said three polls ought to be counted, and did count them. Thereupon J. appealed to the Supreme Court of Canada, and it was—Held, affirming the judgment of Mr. Justice Peters, that in the present case the deputy returning officer having had the means of identifying the ballot papers as being those supplied by him to the voters, and the neglect of the deputy returning officers to put their initials on the back of these ballot papers, not having affected the result of the election, or caused substantial injustice, did not invalidate the election. The decision in the *Monck election case* commented on and approved of. *Queen's County Election (Dom.)—Jenkins v. Brecken*, 7 S. C. R. 247.

See also *Bothwell Election (Dom.)—Hawkins v. Smith*, 8 S. C. R. 676.

6. Proceedings to Enforce Penalties.

Held, that (37 Vict. c. 9, s. 109) which gives a civil remedy by action of debt or information for the recovery of the penalties imposed for the offence of bribery, &c., committed in contravention of sec. 92 of the Act, is not ultra vires of the Dominion parliament. *Doyle v. Bell*, 32 C. P. 632. This case has been carried to appeal.

An action to recover the penalty of \$200 imposed by 37 Vict. c. 9, s. 108. The 6th paragraph of the statement of claim alleged that the defendant as Deputy Returning Officer neglected to make out the statement required by sec. 57, and enclose it in the ballot box. The 7th paragraph alleged that the defendant pretended that he did make up the statement in question, but that he inclosed it by mistake in the envelope containing the ballot papers; and charged that the doing so, was a neglect of duty, within the meaning of the statute. The defence denied the statement of claim, and alleged, (2) that the non-performance of any formality was unintentional on the part of the defendant, and was not the result of a guilty mind. On a motion to strike out the second paragraph of the defence, Cameron, J., gave leave to the plaintiff to take exception to that paragraph by demurrer. And, Semble, that the paragraph shewed no valid ground of defence, and that if the defendant made the alleged mistake, no cause of action existed under sec. 57. *Cameron v. Lucas*, 9 P. R. 405.

In an action under R.S.O. c. 10, s. 182, against an agent for the sale of crown lands to recover a penalty alleged to have been incurred by voting at an election of a member to the Legislative Assembly, contrary to sec. 4 of the Act:—Held, overruling a demurrer to the statement of claim, that, though forfeitures and penalties belong to the Crown unless otherwise disposed of, the sum declared to be forfeited by sec. 4 of the Act for a breach thereof is a penalty within the meaning of sec. 182, sub-s. 1, for which an action may be maintained by any person who will sue for the same. *Shrigley v. Taylor*, 4 O. R., Q. B. D. 396.

III. SCRUTINY AND RECOUNT.

On a scrutiny the practice is for the person in a minority to first place himself in a majority, and then for the person thus placed in a minority to strike off his opponent's votes. *Stormont Election (Ont.)—Bethune v. Colquhoun*, 1 H. E. C. 21; 7 C. L. J. 213.

An objection that the persons objected to were not owners, tenants, or occupants within s. 5, of 32 Vict. c. 21, excluded an objection as to the value of the assessed property.—*Morrow's vote. South Grenville Election (Ont.)—Ellis v. Fraser*, 1 H. E. C. 163.

Where a petition claims the seat a scrutiny of votes may be ordered to be taken in each municipality by the registrar acting for the judge on the rota. *West Elgin Election (Ont.)—Cascaden v. Munroe*, 1 H. E. C. 227.

During the scrutiny of votes the respondent abandoned the seat to his opponent, after his opponent had secured a majority of eight votes, and agreed that such should stand as his opponent's majority, and that the court should declare such opponent duly elected; and the same was ordered by the court. *Id.*

A petitioner claiming the seat on a scrutiny may shew, as to votes polled for his opponent: (1) that the voter was not 21 years of age; (2) that he was not a subject of Her Majesty by birth or naturalization; (3) that he was otherwise by law prevented from voting; and (4) that he was not actually and bona fide the owner, tenant, or occupant of the real property in respect of which he is assessed. *North Victoria Election (Dom.)—Cameron v. MacLennan*, 1 H. E. C. 584; 10 C. L. J. 217.

Quære, whether the county judge can object to the validity of a ballot paper when no objection has been made to the same by the candidate or his agent, or an elector, in accordance with the provisions of 37 Vict. c. 10 s. 56, at the time of the counting of the votes by the deputy returning officer. *Queen's County Election (Dom.)—Jenkins v. Brecken*, 7 S. C. R. 247.

See *Russell Election (Ont.)—Baker v. Morgan*, 1 H. E. C. 519, p. 526. See also, *Bothwell Election (Dom.)—Hawkins v. Smith*, 8 S. C. R. 676.

IV. AGENCY.

1. Generally.

Observations on the reasons why candidates should be held liable for acts done by their agents. The Taunton case (1 O'M. & H. 184), approved. *West Toronto Election (Ont.)—Armstrong v. Crooks*, 1 H. E. C. 97.

Agency in election matters is a result of law to be drawn from the facts of the case, and the acts of the individuals. *East Peterborough Election (Ont.)—Stratton v. O'Sullivan*, 1 H. E. C. 245.

The law of election agency is not capable of precise definition, but is a shifting elastic law, capable of being moulded from time to time to meet the inventions of those who in election matters seek to get rid of the consequences of their acts. *North Ontario Election (Dom.)—Gibbs v. Wheler*, 1 H. E. C. 785.

Per Gwynne, J. That if an act, made a corrupt practice by statute, is done by an agent of a candidate, but not in pursuance of the object of the agency or the interest of the candidate, or in any way in relation to the election, but solely for the purpose, interest, or gratification of the agent, such act, not being done by such agent qua agent, is not within the penalties of 36 Vict. c. 2, s. 3. *Lincoln Election (Ont.)—Rykert v. Neelon*, 1 H. E. C. 391; 12 C. L. J. 161.

Allegation, that the government of the Province of Ontario, in the interest and on behalf of the respondent, used undue influence to secure his return. Objection, that no agency was alleged, and because no such agency, if alleged, could in law exist:—Held, that this objection should be left to be disposed of by the judge at the trial; and, *Semble*, that evidence of agency could be given under the allegation. *In re West Huron Election (Dom.)—Mitchell v. Cameron*, 1 O. R., Q. B. D. 433.

Observations on the impropriety of Division Court bailiffs canvassing voters during an election. *North Victoria Election (Dom.)—Cameron v. Maclellan*, 1 H. E. C. 612.

The parliamentary law of agency is a special law, and is different from the ordinary law of agency. In parliamentary elections the principal is liable for all acts of his agent, even where such acts are done contrary to the express instructions of such principal. *Cornwall Election (Dom.)—Bergin v. Macdonald*, 1 H. E. C. 547; 10 C. L. J. 313.

2. Individual Agents.

To sustain the relation of agency, the petitioner must shew some recognition by the candidate of a voluntary agent's services. The Westminster case (1 O'M. & H. 89) as to agency followed. *Welland Election (Ont.)—Beatty v. Currie*, 1 H. E. C. 47.

When a candidate puts money into the hands of his agent, and exercises no supervision over the way in which the agent is spending that money, but accredits and trusts him, and leaves him the power of spending the money, although he may have given directions that none of the money should be improperly spent, there is such an agency established that the candidate is liable to the fullest extent not only for what that agent may do, but also for what all those whom that agent employs may do. *South Grey Election (Ont.)—Hunter v. Lauder*, 1 H. E. C. 52; 8 C. L. J. 17.

Evidence was given to shew that certain parties had attended meetings with the respondent and canvassed for him, and had performed other acts of alleged agency, as set out in the evidence:—Held, that the acts of alleged agency relied on in the evidence were not sufficient to constitute such parties the agents of the respondent. The petition, nevertheless, was dismissed without costs. *North York Election (Ont.)—Gorham v. Boulbee*, 1 H. E. C. 62.

A voter who had a claim of \$3 from a former election of respondent, when canvassed to vote, said he did not think he should vote, evidently putting forth the \$3 that was due to him as a grievance. The clerk of an agent of the respon-

dent promised to pay it to him, and he voted, and the money was paid after the election, and charged by the clerk in the agent's account as "paid J. Landy \$3," but without the knowledge of such agent. Another agent of the respondent (McD.), who was treasurer of the ward, and was aware of the claim, and had told the voter it would be made right, paid the first agent's account, but did not then take particular notice of the payment, and it was not explained to him. The clerk had been requested by his employer (the agent first mentioned) to canvass a particular voter, but was not employed as a canvasser generally by any one:—Held (1), that such clerk was not an agent or sub-agent of the respondent. (2) That the payment of the account by the agent (McD.) was not under the circumstances a ratification by him after the act, so as to affect the election. *West Toronto Election (Ont.)—Armstrong v. Crooks*, 1 H. E. C. 97.

One C. accompanied the respondent when going to a public meeting, and canvassed at some houses. On the journey, the respondent cautioned C. not to treat, nor do anything to compromise him or avoid the election. The respondent's agent paid for C.'s meals at the place where the meeting was held:—Held, that the evidence shewed that the respondent had availed himself of C.'s services, and was therefore responsible for his acts. *East Peterborough Election (Ont.)—Stratton v. O'Sullivan*, 1 H. E. C. 245.

A witness stated that he had asked the people in his neighbourhood to vote for the respondent, had attended a meeting of the his friends, and made arrangements for bringing up voters on polling day, and had a team out on polling day:—Held, that the evidence of his being an agent of the respondent was not sufficient. *Id.*

One S., who desired nomination as a candidate by a reform convention, was not nominated, and thereupon, from hostility to the convention and its nominee, opposed the candidate of the convention, which thereby had the effect of supporting the respondent. At the close of the poll, the respondent publicly thanked S. for being instrumental in bringing about his election. S. owned a shop and tavern, but the license for the latter was in his clerk's name; and during the polling hours on polling day spirituous liquors were sold and given in the shop and tavern:—Held, that what was done by S. at the election was in pursuance of a hostile feeling against the convention and its candidate, and did not constitute him an agent of the respondent. *Cardwell Election (Ont.)—O'Callaghan v. Flesher*, 1 H. E. C. 269.

One M., the reeve of a township, exerted himself strongly in favour of the respondent, to whom he was politically opposed, and against the other candidate, and attended meetings where the respondent was, and spoke in his favour. The reason for his supporting the respondent and opposing the other (ministerial) candidate, with whom he was politically in accord, was, that the ministry of the day had separated the township of which he was reeve from the Riding. He was annoyed and indignant at this separation, and announced his intention of using all his influence against the ministerial candidate. The respondent asked M. to attend a public meeting, which he did; and at

another meeting which he attended, M. stated (but not in the respondent's hearing) that he was acting there on the respondent's behalf. M. was once in the respondent's committee room, and signed and circulated circulars issued by the respondent's friends:—Held, That the question of agency being one of intent, the respondent, under the circumstances, never conferred upon M. the authority, nor did M. accept the delegation, of an agent for the purpose of the election. *North Grey Election (Ont.)—Boardman v. Scott*, 1 H. E. C. 362; 11 C. L. J. 242.

Merely canvassing of itself does not prove agency, but it tends to prove it. A number of acts, no one of which might in itself be conclusive proof of agency, may, when taken together, amount to proof of such agency. Persons who canvassed and went to meetings with the respondent, and attended meetings to promote the election, at which meetings the respondent attended; and persons who canvassed with and introduced voters to the respondent, called meetings and appointed canvassers, examined the results of the canvass, and did other acts to further the election, were held to be agents of the respondent; and corrupt practices committed by them, and by sub-agents appointed by them, avoided the election. *Cornwall Election (Dom.)—Bergin v. Macdonald*, 1 H. E. C. 547; 10 C. L. J. 313.

A year before the election the respondent paid part of the charges of a lawyer retained by one O. to attend the revision of the assessment rolls. O. at the time of the election attended one of the respondent's meetings at which he stated that his own mind was not made up, but he urged that the respondent ought to have the support of the voters, he being a local man; and in three or four instances O. asked voters to vote for the respondent. The respondent and his friends distrusted O., and in no way recognized him as acting with them:—Held, that O. was not an agent of the respondent for the purposes of the election. *Hallon Election (Dom.)—Cross v. McCrancy*, 1 H. E. C. 736.

One C. canvassed for the respondent, and told the respondent he was going to support him, and the respondent expected and understood that he would do everything he could for him legitimately. C. did not attend any meetings of the respondent's committees, and made no returns of his canvassing:—Held, on the evidence set out in the judgment, that C. was an agent of the respondent for the purposes of the election. *Cornwall Election (3) (Dom.)—MacLennan v. Bergin*, 1 H. E. C. 803.

One P., a tavern keeper, took the petitioner's side at the election and at a meeting called by the petitioner, at which he was appointed chairman. Notices of this meeting were sent by the petitioner to P. to distribute, some of which P. put up at his house and some he sent to other places. On polling day P. desired to give a free dinner to some of the petitioner's voters, and asked the petitioner if he might do so. The petitioner did not approve of it in case it should interfere with his election, and warned P. that although he was not his (petitioner's) agent, he would rather he should not do it. P., notwithstanding this, paid for free dinners to 40 of the petitioner's voters:—Held, by the Court of Queen's Bench (affirming Wilson, J.), That P.

was not an agent of the petitioner. *North Victoria Election (2) (Dom.)—Cameron v. MacLennan*, 1 H. E. C. 671; 11 C. L. J. 163.

Semble, if a candidate in good faith undertakes the duties which his agent might undertake, the acts of a few zealous political friends in canvassing for him, introducing him to electors, attending public meetings and advocating his election, or bringing voters to the poll, would not make such candidate responsible for prohibited acts contrary to his publicly declared will and wishes, and without his knowledge and consent. *South Norfolk Election (Dom.)—Decau v. Wallace*, 1 H. E. C. 660.

The respondent in his evidence stated that he objected to committees; that he knew certain persons were his supporters, and believed they did their best for him, but he did not personally know that they acted for him. Other evidence shewed that these persons took part in the election on behalf of the respondent; some spoke for him at one of his meetings; and one of them stated that he and some of the others canvassed for the respondent, and that he gave the respondent to understand he was taking part in the election for him:—Held, that as it did not appear that any one of these persons was authorized by the respondent to represent him, and as they did not claim to have any such authority from him, but supported the respondent as the candidate of their party, the said persons were not agents of the respondent for the purposes of the election. *Id.*

Remarks on the evidence of agency:—Semble, that if a candidate who had appointed no agents was aware that some of his supporters were systematically working for him, and by any act, or forbearance, could be fairly deemed to recognize and adopt their proceedings, he would make them his agents. *Id.*

See *South Ontario Election (Ont.)—Farwell v. Brown*, 1 H. E. C. 420, p. 558; *Russell Election (Ont.)—Ogilvie v. Baker*, 1 H. E. C. 199, p. 558.

3. Members of Committees.

If a meeting of electors assembles and has the sanction of the candidate, such candidate is responsible for its acts and the acts of the agents appointed by it. But where the meeting is large, then all present cannot be considered as agents; only those to whom certain duties, either as a committee or as individual canvassers, are assigned. *Cornwall Election (Dom.)—Bergin v. Macdonald*, 1 H. E. C. 547; 10 C. L. J. 313.

The respondent nominated no committees to promote his election; but he was aware that committees were acting for him in each municipality. On one occasion he went to the door of one of the committee rooms, and left some printed bills to be distributed. One P. who attended the meetings of this committee, and who said he was considered on the committee, committed an act of bribery:—Held, that the committee were agents of the respondent, that P. was a member of the committee; and an act of bribery having been committed by him, the election was avoided. *East Northumberland Election (Dom.)—Gibson v. Biggar*, 1 H. E. C. 577.

Certain supporters of the respondent met in a room over a tavern to promote the election of the respondent. Their meetings were presided over by an agent of the respondent, and the respondent attended at least one of such meetings:—Held, that the persons who attended such meetings were agents of the respondent. *North Ontario Election (Dom.)*—*Gibbs v. Wheeler*, 1 H.E.C. 785.

4. Members of Political Associations.

The delegates to a political convention assembled for the purpose of selecting a candidate, who never had intercourse with the candidate selected, and who never canvassed in his behalf, cannot be considered as agents for such candidate. *Welland Election (Ont.)*—*Buchner v. Currie*, 1 H.E.C. 187.

Where a political organization, after nominating their candidate, divided into committees "to look after voters in the particular wards in which they resided;" and the respondent had not given authority to any member of such committees, nor to any canvasser, to canvass generally:—Held, that one K., who was a member of the committee for Ward No. 2, and who was alleged to have committed an act of bribery in Ward No. 6, having no authority to canvass in the latter ward, was an agent with limited authority to canvass in Ward No. 2 only, and therefore the respondent could not be made liable for his alleged acts. *London Election (Ont.)*—*Jarman v. Meredith*, 1 H.E.C. 214.

One M. was a member of a township committee, organized by direction of the convention which nominated the respondent, and the work of the election was put into the hands of these township committees. M. canvassed his school section, and had a voters' list, which was taken from him by the committee on the allegation that he was not doing much. The respondent never asked M. to work for him, but M. asked the respondent what success he had. The respondent had no one acting for him except these committees and some volunteers, and he never objected to the aid they were giving him, nor did he repudiate their services:—Held, on the evidence, that the respondent was responsible for these committees, and that M., as a member of one of such committees, was an agent of the respondent. *North Ontario Election (Ont.)*—*McCaskill v. Paxton*, 1 H.E.C. 304.

About a dozen of the electors met some time before the election and nominated the respondent as the candidate who should contest the election in the interest of the political party to which they belonged. The respondent accepted and acted upon the nomination. They met occasionally for the purpose of promoting the respondent's election, procured voters' lists, canvassed voters, and got reports on which they estimated their chances of success:—Held, that if they did not style themselves a committee, they had assumed the functions which usually devolve upon such bodies. *North Wentworth Election (Ont.)*—*Christie v. Stock*, 1 H.E.C. 343; 11 C.J.L. 196, 296.

The fact of a political association putting forward and supporting a particular candidate does not make every member of the association his agent; but the candidate may so avail himself of their services in canvassing for him and pro-

moting his election, as to make them his agents. *North Grey Election (Ont.)*—*Boardman v. Scott*, 1 H.E.C. 362; 11 C.L.J. 242.

By the constitution of a reform association, each delegate to the convention was actively to promote the election of the candidate appointed by the convention. The respondent had himself been for six years a member of the association, and was familiar with its objects and constitution. He had also as a delegate acted and canvassed for other candidates in the promotion of their elections, and expected the like assistance from the present members of the association, and to the perfection of that system as an electioneering agency, the respondent owed his election:—Held, that the delegates to the association, acting as such in promoting the election of the respondent, were his agents, for whose acts he was responsible; and that an act of bribery committed by one R., a delegate, and who canvassed and otherwise acted for the respondent, avoided the election. *East Northumberland Election (Ont.)*—*Casey v. Ferris*, 1 H.E.C. 387.

The respondent was nominated by a conservative association, and he accepted the nomination. The delegates to the association were to do all they could to secure his election. A committee was appointed in O. to canvass the town, and a committee room was engaged and paid for by the association, voters' lists were procured and used as canvassing books, and members were appointed to canvass parts of the town, and reports were made to the committee of the result of the canvassing. The respondent, who resided at W., did not attend the meetings, but knew they were canvassing for him, and gave them blank appointments of scrutineers to fill up, which they did, but the respondent did not know who composed the committee:—Held, per Wilson, J., that the respondent, by authorizing such committee at O. to appoint scrutineers, made them his special agents for that particular matter and for that occasion only, and did not adopt them as his general agents for all the purposes of the election. *South Ontario Election (Ont.)*—*Farwell v. Brown*, 1 H.E.C. 420; *S.C. sub nom Farewell v. Brown*, 12 C.L.J. 216.

One T., a member of such committee, canvassed actively for the respondent and to his knowledge, and on the nomination day attended a meeting of the respondent's friends in W., at which the respondent was present, and at which arrangements were made about canvassing and getting out votes, and generally about the election:—Held, by the Court of Appeal, Wilson, J., dubitante, that T. was an agent of the respondent for the purposes of the election. *Id.*

One G., a member of the same committee, had a voters' list, and canvassed for the respondent, and stated he had no doubt the respondent expected him to vote and work for him:—Held, per Wilson, J., that G. was not an agent of the respondent. *Id.*

The committee of the town of W., having been recognized and attended by the respondent, were held to be his agents. *Id.*

5. Sub-Agents.

On a charge of bribery against one T., and one A., upon which this appeal was decided, the-

Judge who tried the petition found as a fact that A. had been directed by T., an admitted agent of the respondent, to employ a number of persons to act as policemen at one of the polling places in the parish of Bay St. Paul, on the polling day, and had bribed four voters previously known to be supporters of the appellant, by giving them \$2 each, but Held that A. was not agent of the respondent, and, therefore, his acts could not void the election:—Held, on appeal, that as there was no excuse or justification for employing these voters, their employment was merely colourable, and these voters having changed their votes in consequence of the moneys so paid to them, and the sitting member being responsible alike for the acts of A., the sub-agent, as for the acts of T., the agent, and they having been guilty of corrupt practices, the election was void. (Taschereau and Gwynne, JJ., holding that A., the sub-agent alone, had been guilty of bribery.) *Charlevoix Election (Dom.)*.—*Cimon v. Perrault*, 5 S. C. R. 133.

The respondent gave to one H. some canvassing books, with directions to put them into good hands to be selected by him for canvassing. H. gave one of the books to B., a tavern-keeper, and B. canvassed for the respondent. B. was found guilty of a corrupt practice in keeping that part of his tavern wherein liquors were kept in store, so open that persons could and did enter the store-room and drink spirituous liquors there during polling hours on the day of election:—Held, that H. was specially authorized by the respondent to appoint sub-agents, and had under such authority appointed B. as sub-agent, and the corrupt practices committed by B. avoided the election. *Welland Election (Ont.)*.—*Buchner v. Currie*, 1 H. E. C. 187; 11 C. L. J. 273.

See *South Croy Election (Ont.)*.—*Hunter v. Lander*, 1 H. E. C. 52, p. 529; *Cornwall Election (Dom.)*.—*Bergin v. Macdonald*, 1 H. E. C. 547, p. 531; *West Toronto Election (Ont.)*.—*Armstrong v. Crooks*, 1 H. E. C. 97 p. 530; *Niagara Election (Dom.)*.—*Black et al. v. Plumb*, 1 H. E. C. 568, p. 543.

V. BRIBERY AND CORRUPT PRACTICES.

1. Generally.

The difference between the Imperial statute (17-18 Vict. c. 102, s. 2, sub-s. 3, proviso), and the Ontario statute (32 Vict. c. 21, s. 67, sub-s. 3, proviso), as to "legal expenses" in elections, pointed out. *East Toronto Election (Ont.)*.—*Rennick v. Cameron*, 1 H. E. C. 70.

Held, that "illegal and prohibited acts relating to elections," in the definition of corrupt practices in the Ontario Controverted Elections Act, 1871, were confined to bribery, hiring of teams, and undue influence, as defined by ss. 67 to 74 of the Election Act of 1868. *North York Election (Ont.)*.—*Gorham et al. v. Boulbee*, 1 H. E. C. 62.

The words "illegal and prohibited acts in reference to elections," used in 34 Vict. c. 3, s. 3, O., mean such acts done in connection with, or to affect, or in reference to elections; not all acts which are illegal and prohibited under the election law. *Brockville Election (Ont.)*.—*Flint v. Fitzsimmons*, 1 H. E. C. 139; 32 Q. B. 132.

The definition of "corrupt practices" in s. 3 of the Dominion Controverted Elections Act 1873, considered. *North Victoria Election (Dom.)*.—*Cameron v. Maclellan*, 1 H. E. C. 584; 10 C. L. J. 217.

The Imperial and Dominion election laws, as to corrupt practices and their consequences, compared and considered. *Kingston Election (Dom.)*.—*Stewart v. Macdonald*, 1 H. E. C. 625.

Where corrupt practices by agents, and others in the interest of the respondent, affected less votes than the majority obtained by the respondent at the election:—Held, under 39 Vict. c. 10, s. 37, O., that such corrupt practices did not extend beyond the votes affected thereby, and did not void the election. *Lincoln Election (Ont.)*.—*Pauling v. Rykert*, 1 H. E. C. 489.

Semble, that the term "wilful," as used in s. 98 of 37 Vict. c. 9, D., cannot be construed in a narrower sense than the term "corruptly" in s. 92, sub-s. 1; and that the term "corruptly" does not mean wickedly, or immorally, or dishonestly, but doing that which the Legislature plainly meant to forbid; as an act done by a man knowing that he is doing what is wrong, and doing it with an evil object. *Halton Election (Dom.)*.—*Cross v. McCraney*, 1 H. E. C. 736.

The plain and reasonable meaning of the statute, 32 Vict. c. 21, O., is, that when the prohibited things are done in order to induce another to procure, or to endeavour to procure, the return of any person to serve in Parliament, or the vote of any voter at any election, the person so doing is guilty of bribery. *East Toronto Election (Ont.)*.—*Rennick v. Cameron*, 1 H. E. C. 70.

Per Richards, C. J. The intention of the Legislature was, that votes should be given from the conviction in the mind of the voter that the candidate voted for was the best person for the situation, and that the public interest would be best served by electing him, and the evil to be corrected was supporting a candidate *causa lucri*, or for personal gain in money or money's worth to the voter. *Halton Election (Ont.)*.—*Bussell v. Barber*, 1 H. E. C. 283; *S. C. sub nom, Harris v. Barber*, 11 C. L. J. 273.

The giver of a bribe as well as the receiver may be indicted for bribery. *North Victoria Election (Dom.)*.—*Cameron v. Maclellan*, 1 H. E. C. 584.

The first principle of parliamentary law is that elections must be free; and therefore, without referring to statutory provisions, if treating was carried on to such an extent as to amount to bribery, and undue influence was of a character to affect the election, the election would be void. *Id.*

A single bribed vote brought home to a candidate would throw doubt on his whole majority, and would therefore annul his return. *Id.*

The avoidance of an election for an act of bribery committed by the agent of a candidate is a civil proceeding, and is not brought about to punish the candidate, but to secure an unbiased election. *Kingston Election (Dom.)*.—*Stewart v. Macdonald*, 1 H. E. C. 625.

See *West Hastings Election (Ont.)*.—*Wesley v. Wills*, 1 H. E. C. 211, p. 556.

2. Bribery.

(a) Generally.

Bribery is not confined to the actual giving of money. Where a grossly inadequate price has been paid for work or for an article, it is clearly bribery. *Cornwall Election (Dom.)—Bergin v. Macdonald*, 1 H. E. C. 547; 10 C. L. J. 313.

The payment of a voter's expenses in going to the poll is illegal, as such, and a corrupt practice, even though the payment may not have been intended as a bribe. *South Grey Election (Ont.)—Hunter v. Lauder*, 1 H.E.C. 52; 8 C.L. J. 17.

Where money was paid to voters for services agreed to be rendered but such services were not rendered owing to the misconduct of the voters, such payment was not bribery. *West Toronto Election (Ont.)—Armstrong v. Crooks*, 1 H. E. C. 97.

Where half a cord of wood was given to a voter in poor circumstances during the election, and the giver swore that it was given out of charity:—Held, not an act of bribery. *London Election (Ont.)—Jarman v. Meredith*, 1 H. E. C. 214.

Where a voter was bailed out of gaol on the day of polling by a friend, but according to the evidence without reference to the election:—Held, not an act of bribery. *Id.*

See *London Election (Ont.)—Jarman v. Meredith*, 1 H. E. C. 214, p. 547; *North Victoria Election (Dom.)—Cameron v. MacLennan*, 1 H. E. C. 584, p. 536.

(b) By Candidates.

The respondent after announcing himself as a candidate, gave \$10 in two \$5 bills to a child of a voter, then three or four years old, which had been named after him. He had two years previously intimated that he would make the child a present:—Held, that the gift, under such circumstances, was not bribery. *Glenagarry Election (Ont.)—McLennan v. Craig*, 1 H. E. C. 8.

The respondent while canvassing had refreshment for his man and two horses at a tavern for part of a day and night, for which he paid the tavern-keeper \$5, and next day \$5 more, in all \$10, without asking for a bill. The bill would have amounted to about \$3. The respondent stated that the tavern-keeper was an old friend of his, and was just starting in business, and that he thought it right to pay him as it were a compliment on his first visit to his tavern, and that he believed he would have done the same thing if it was not election time:—Held, that being an isolated case in an election contest, free from profuse expenditure, and this being a quasi-criminal trial, involving grievous results to the respondent if found a corrupt practice, such payment was not—after the explanations of the respondent—an act of bribery. *Id.*

The wife of one S., a voter, had been injured some years before the election by the horses of the respondent, and in 1872 the respondent gave S. compensation for the injury partly by cancelling a debt and partly in cash, for which S. signed a receipt "in full of all accounts and

claims whatsoever." The respondent canvassed S. during the election, saying: "I would like to have you with me at the election," but S. declined, expressing dissatisfaction with the compensation made for the injury to his wife, to which the respondent replied that he was able to do, and could do, what was right. Afterwards the respondent sent his salesman to the wife of S. who told her that the respondent was still able to do justice, to which she replied she would write a letter, which she did, and in which she referred to her husband's vote. After the election the respondent gave S. \$30 partly by cancelling a debt and partly in cash. The respondent denied that he gave S. to understand that he would give him anything to induce him to vote for him at the election:—Held, by the Court of Appeal, affirming Gwynne, J., that the evidence shewed that an indirect offer of money or other valuable consideration was made by the respondent to S., to induce him to vote for the respondent. *Lincoln Election (Ont.)—Rykert v. Neelon*, 1 H. E. C. 391; 12 C. L. J. 161.

The respondent was charged with using means of corruption at his election (1) by giving up a promissory note and also \$20 to one M., on condition of M. and his sons voting for him; the charge depended upon the contradictory oaths of M. and the respondent; (2) by giving a large subscription to an election fund, some of which was expended for illegal purposes; and (3) by subscriptions to churches. The respondent denied any corrupt motive in these subscriptions. The election judge, on the evidence, found that the respondent was not personally guilty of corrupt practices, but he avoided the election on the ground of bribery by agents. *South Huron Election (Dom.)—Ritchie v. Cameron*, 1 H. E. C. 576; 24 C. P. 488.

Per Hagarty, C. J.—Candidates and agents should select less suspicious seasons than election times for exercising their liberality towards charitable and religious objects. *Id.*

Held, that if gifts and subscriptions for charitable purposes, made by a candidate who is in the habit of subscribing liberally to charitable purposes, are not proved to have been offered or made as an inducement to, or on condition that, any body of men, or any individual, should vote or act in any way at an election, or on any express or implied promise or undertaking that such body of men, or individual, would, in consequence of such gift or subscription, vote or act in respect to any future election, then such gifts or subscriptions are not a corrupt practice, within the meaning of that expression as defined by the Dominion Election and Controverted Elections Acts, 1874. *South Ontario Election (Dom.)—McKay v. Glen*, 1 H. E. C. 751; 3 S. C. R. 641.

Held, that the settlement by payment of a just debt by a candidate to an elector without any reference to the election is not a corrupt act of bribery, and especially so when the candidate distinctly swears he never asked the elector's support, and the elector says he never promised it and never gave it. *Id.*

One P., some years before the election, claimed that the respondent was indebted to him, but the respondent denied all liability, and the dispute caused a coolness between them. One H., four months before the election, was employed

by P. to collect another account from the respondent, and did so. H. stated to P. that as the respondent was in a good humour, it would be a good opportunity to get the old account settled, and asked P. if he would support the respondent in case the old account was settled. P. replied that he might promise what he liked. H. then took the account to the respondent, who looked it over and gave his note for it. H. and the respondent never referred to the election, nor to the settlement as affecting the election:—Held, that the respondent had not been guilty of bribery in this transaction. *Taschereau and Gwynne, JJ.*, doubting whether the transactions proved were not within the prohibitory provisions of the Act. *Id.*

The respondent owed one M. a debt, which had been due for some time. He was sued for it about the time of the election, and was informed that his opponents were using the non-payment of it against him in the election. The respondent stated he would not pay it until after the election as it might affect his election:—Held, that the promise to pay the debt was not made to procure votes, but to silence the hostile criticism, and was therefore not bribery. *North Ontario Election (Dom.)—Gibbs v. Wheeler, 1 H. E. C. 785.*

The respondent had in 1873 compromised with his creditors for 50 cents in the \$, and then promised to pay all his creditors in full. About the time of the election he paid one S., who had at the two previous elections supported the opposing candidate, a portion of the promised amount:—Held, under the circumstances, the payment was not bribery. *Dundas Election (Ont.)—Cook v. Broder, 1 H. E. C. 205.*

As to the case of one J. F. G., the charge was that the respondent bribed him by the payment of a promissory note for \$89. The evidence shewed that J. F. G. had been canvassing for respondent a long time before the note fell due, and had always supported him. He was on his way to retire his note, which was overdue or falling due that day, when respondent asked him to canvass that day, and promised to send into town and have the note arranged for him. At the same time J. F. G. was negotiating for a loan on a mortgage to respondent, and it was at first stipulated that the amount of this note should be taken out of the mortgage money. The agent of the respondent, after the election, at the request of J. F. G., paid the mortgage money in full and allowed the matter of the note to stand until J. F. G. could see respondent. J. F. G. stated that neither the note nor the mortgage transaction influenced him in any way, and that he had to pay the note and did not expect respondent to make him a present of it:—Held, that the evidence did not shew that the advance of money was made in order to induce J. F. G. to procure, or endeavour to procure the return of the respondent, and was not therefore bribery within the meaning of sub-s. 3 of sec. 92 of the Dominion Elections Act, 1874. *Selkirk Election (Dom.)—Young v. Smith, 4 S. C. R. 494.*

See *Halton Election (Ont.)—Russell et al. v. Barber, 1 H. E. C. 283, p. 576*; *North Ontario Election (Dom.)—Wheeler v. Gibbs, 1 H. E. C. 785, p. 553*; *Bellechasse Election (Dom.)—Larue v. Deslauriers, 5 S. C. R. 91, p. 576.*

(c) By Agents.

The admission of counsel in open court—that the giving of \$2 to a voter by an agent of the respondent, after such voter had voted, such voter admitting that he did not know why the \$2 was given to him, was bribery—acted upon, and the election avoided. *Carleton Election (Ont.)—Lyon v. Monk, 1 H. E. C. 6.*

A voter who had been frequently fined for drunkenness was canvassed by C. to vote for the respondent, and was asked by him “how much of that money” (paid in fines) “he would take back and leave town until the election was over.” Counsel for the respondent admitted that C. was an agent of the respondent, and that the evidence was sufficient to avoid the election:—Held, that the election was void on account of corrupt practices by an agent of the respondent. *Cornwall Election (Ont.)—Snetzing v. McIntyre, 1 H. E. C. 203.*

One M., a carter, who voted for respondent, at the request of P., the respondent's agent, carried a voter five or six miles to the polling place, saying that he would do so without charge. Some days after the election, P., the agent, gave M. \$2, intending it as compensation for the conveyance of such voter to the poll, but M. thought it was in payment for work which he had done for P. as a carter. The candidate knew nothing of the matter:—Held, that there was properly no payment by P. to M. for any purpose, the money being given for one purpose and received for another; but that if there had been, it was made after P.'s agency had ceased, and there was no previous hiring or promise to pay, to which it could relate back. If such payment had been established as a corrupt practice, it would have avoided P.'s vote, but not M.'s; and it would not have defeated the election, for it was not found to have been committed with the knowledge or consent of the candidate, but the contrary. *Brockville Election (Ont.)—Flint v. Fitzsimmons, 1 H. E. C. 139; 32 Q. B. 132.*

An agent of the respondent, while canvassing a voter, gave \$8 to the widowed sister of the voter, an old friend of his, who was then in reduced circumstances. The agent stated that this was not the first money so given, and that it was in no way connected with the election:—Held, under the circumstances, not an act of bribery. *North Victoria Election (Ont.)—McRae v. Smith, 1 H. E. C. 252.*

An offer by an agent of the respondent when canvassing a voter, that he “would see him another time and things would be made right,” is not an offer of bribery. *Id.*

An elector when asked to vote for respondent said that it would be a day lost if he went to vote, which would cost him \$1. To which the canvasser replied: “Come out, and your \$1 will be all right.”—Held, not sufficient to establish a charge of bribery. *Monck Election (Ont.)—Collier v. McCallum, 1 H. E. C. 154.*

One M., the financial agent of the petitioner, agreed with a voter who had a difference with the petitioner, about a right to cut timber on the voter's land, to settle the matter—the voter when canvassed to vote for the petitioner referring to this difference. M. signed an agreement in the petitioner's name, whereby he surrendered any

claim to cut timber except as therein mentioned:—Held, 1. That a surrender of the right to cut timber on the lands of another was a "valuable consideration," within the meaning of the bribery clauses of 32 Vict., c. 21, O. 2. That the agent M. was guilty of an act of bribery. *North Victoria Election (Ont.)—McRae v. Smith*, 1 H. E. C. 252.

One H., a voter, held a claim against the respondent, and M. and another, for five years, which he had been endeavouring to procure payment of. When canvassed at the time of the election, he stated that if he did not get it settled he would not vote for the respondent. M. induced the respondent to give his promissory note to H. for the debt, but did not give the respondent to understand directly or indirectly that the note had anything to do with the election:—Held, 1. That it is always open to enquire, under statutes similar to the Election Acts, whether the debt was paid in accordance with the legal obligation to pay it, or in order to induce the voter to vote or refrain from voting. 2. (affirming *Wilson, J.*) That on the evidence, the motive which induced M. was that of procuring the voter H. to vote at the election, and that thereby an act of bribery was committed by M. as such agent, which avoided the election. *North Ontario Election (Ont.)—McCaskill v. Paxton*, 1 H. E. C. 304.

One L., a tavern keeper, was told by H., one of respondent's canvassers, that he thought L. could get \$18 or \$20 from P., if he would stay at home during the election. L. expected that the money would be spent at his tavern, and shewed that he did not know what was intended. Neither H. nor P. were examined:—Held, on the evidence, there was no actual offer to bribe. *North Victoria Election (Dom.)—Cameron v. MacLennan*, 1 H. E. C. 612.

Bribery is not confined to the actual giving of money. Where a grossly inadequate price has been paid for work or for an article, it is clearly bribery. A large sum of money, averaging \$3 per head, had been spent by two of the agents of the respondent, and money had been given by them to parties without any instructions:—Held, that where such money had been applied improperly, it must be considered that it was intended to be so applied. *Cornwall Election (Dom.)—Bergin v. Macdonald*, 1 H. E. C. 547; 10 C. L. J. 313.

The agent C. employed one W. to go with him on the evening before the election to several electors, from whom both C. and W. made colourable purchases, but with the corrupt intention of inducing the persons from whom the purchases were made to vote or refrain from voting at the election:—Held, that C. and W. were guilty of bribery, and that the election was avoided in consequence of their corrupt acts. *Cornwall Election (3) (Dom.)—MacLennan v. Bergin*, 1 H. E. C. 803.

(d) Evidence.

Generally.]—Per Moss, C. J.—Prima facie corrupt practices avoid an election: and the onus of proof that they are not sufficient to affect the majority of votes rests upon the respondent. *West Hastings Election (2) (Ont.)—Holden v. Robertson*, 1 H. E. C. 539.

Where a charge of bribery is only the unaccepted offer of a bribe, the evidence must be more exact than that required to prove a bribe actually given or accepted. *South Grey Election (Ont.)—Hunter v. Lauter*, 1 H. E. C. 52; 8 C. L. J. 17.

Where the evidence as to bribery consists of offers or proposals to bribe, the evidence should be stronger than with respect to actual bribery. Where three voters swore to three separate offers of bribery made to each of them separately by an agent of the respondent, which such agent swore were never made by him:—Held, that the evidence was not sufficient to justify the setting aside of the election. The language of Martin, B., in the *Wigan* case (1 O'M. & H., 192), adopted as a general rule applicable to this case. *East Toronto Election (Ont.)—Ranick v. Cameron*, 1 H. E. C. 70.

Where a candidate in good faith intended that his election should be conducted legally, and had printed and circulated throughout the constituency a synopsis of the new law as to corrupt practices, and had caused an editorial article to be printed in a newspaper, and had taken trouble to have the law explained to the electors:—Held, that although many of the acts done during the election created doubt and hesitation in the mind of the judge, yet as the return of a member ought not to be lightly set aside, the judge ought to be satisfied that the acts done were done to influence the electors and so done corruptly, and this election was upheld. *West Toronto Election (Ont.)—Armstrong v. Crooks*, 1 H. E. C. 97.

Where evidence of an act of keeping open his tavern on polling days and selling liquor therein as usual, by P., an agent of the petitioner, came out on cross-examination, and during the argument the evidence was objected to because the charge was not in the particulars, the case was not considered. *North Victoria Election (Ont.)—McRae v. Smith*, 1 H. E. C. 252.

The evidence respecting a charge of bribery, by payment of a disputed debt, was held insufficient to sustain the charge. *Id.*

On a charge that one O. bribed a voter by promising him to procure a deed of his land for him if he would procure votes for the respondent:—Held, on the evidence, that though the voter had so represented, the procuring of the deed had nothing to do with the election. Semble, that O. was not an agent for whose acts the respondent was responsible. *North Middlesex Election (Ont.)—Cameron v. McDougall*, 1 H. E. C. 376.

A witness stated that he had received a letter from a voter, asking for the fulfilment of an offer as to his vote, but the letter was not produced:—Held, that it was not proved that the letter in question was written by the voter referred to. *Id.*

One S. an alleged agent of the respondent, made offers of sheepskins to two voters as to their votes at the election, but he swore the offers were made in jest; but as the evidence did not shew that S. was an agent of the respondent at the time of the alleged offers, no effect was given to the charge. *Id.*

A statement that an offer to bribe was made in jest should be received with great suspicion;

a briber may make an offer which he intends should be taken seriously, and then, if not accepted, he may assert it was made in jest. *Ib.*

A promise to work for a voter, made without reference to the election and as a joke, not evidence of bribery. *Halton Election (Dom.)—Cross et al. v. McCraney*, 1 H. E. C. 736.

The respondent, in a constituency where 642 persons voted, received 336 votes, and his election expenses were about \$2,000. The money was entrusted by the respondent to one G., with a caution to see that it was used for lawful purposes only. About \$1,200 of this money was given by G. to one W., who distributed it to several persons in sums of \$40, \$100, \$200 and \$250. No instructions as to expenditure were given by G. to W., or by W. to the persons amongst whom he distributed the money; and by the latter several acts of bribery were committed. The respondent publicly and privately disclaimed any intention of sanctioning any illegal expenditure; but made no inquiries after the election as to how the money had been spent until a week or two before the election trial. He denied any act of bribery, direct or indirect, or any knowledge thereof; and no proof was given of a personal knowledge on his part of any of the specific wrongful acts or payments proved to have been committed by persons amongst whom his money had been distributed. —Held, That under the peculiar circumstances of the respondent's canvass, and on a review of the whole evidence, the respondent's emphatic denial of any corrupt motive or intention should be accepted. *Niagara Election (Dom.)—Black et al v. Plumb*, 1 H.E.C. 568; 10 C.L.J. 317.

Held, that the persons amongst whom the respondent's moneys had been distributed by W., and persons acting under them, were sub-agents of respondent, and that their corrupt acts avoided the election. Semble, that no limit can be placed to the number of parties through whom the sub-agency may extend. *Ib.*

¶ Money had been contributed by the respondent and by his friends for the purposes of the election, which had been placed in the hands of one C., a personal and political friend of respondent, who gave it without any instructions or warnings to such committee-men as applied for it. A great deal of this money was spent in corrupt purposes, in bribery, and in treating to the extent of avoiding the election. The respondent in his evidence stated that he did not, directly or indirectly, authorize or approve of or sanction the expenditure of any money for bribery, or a promise of any for such purpose, nor did he sanction or authorize the keeping of any open house, and that he was not aware that any open houses had been kept, and that he always impressed on everybody that they must not violate the law. There was no affirmative evidence to shew that the money which the respondent knew had been raised for the purposes of the election was so large that as a reasonable man he must have known that some portion of it would be used for corrupt purposes. —Held, that looking at the whole case, and at this branch of it, as a penal proceeding, the respondent should not be held personally responsible for the corrupt practices of his agents. *Kingston Election (Dom.)—Stewart v. Macdonald*, 1 H. E. C. 625; 11 C. L. J. 19.

Evidence of corrupt practices committed by persons in the interest of both candidates at the previous election, may be given at the trial of the second petition, with the view of striking off the votes of any such persons who may have voted at the second election. *Cornwall Election (2) (Dom.)—Bergin v. Macdonald*, 1 H.E.C. 647; 11 C. L. J. 81.

The respondent canvassed a voter, who at the trial swore that after he had agreed to vote for him, the respondent promised to give the voter some work; the respondent denied the promise. —Held, although the voter appeared to be a truthful witness and was not shaken on cross-examination, that the promise of employment was not made out beyond all reasonable doubt. *North Ontario Election (Dom.)—Gibbs v. Wheeler*, 1 H. E. C. 785.

A charge that the respondent promised to give a voter certain work to do if he voted for him, was disproved by the evidence of the respondent and another, and by the admissions of the voter made to other parties. *Halton Election (Dom.)—Cross v. McCraney*, 1 H. E. C. 736.

The charge against the respondent and one B., of an offer of money to, and to procure an appointment as justice of the peace for, a voter in consideration of his voting for the respondent, was supported by the evidence of the voter who shewed bitter hostility to B.; but the charge was denied by the respondent. The evidence shewing the statement to be improbable, and that the election contest was carried on by the respondent with a scrupulous and honest endeavour to avoid any violation of the law against corrupt practices, the charge was dismissed. *Ib.*

A charge against an agent of the respondent, that he had promised to procure the office of police magistrate for one W., was denied by the agent of the respondent; and it further appearing that W. had acted on the committee, and voted, for the opposing candidate, the charge was dismissed. *South Ontario Election (Dom.)—McKay v. Glen*, 1 H. E. C. 751.

Conflicting Evidence.—Where the evidence as to the offer of bribes was contradictory, and the parties making charges of bribery appeared to have borne indifferent characters:—Held, that the offer of bribes was not satisfactorily established. *Welland Election, (Ont.)—Buchner v. Currie*, 1 H. E. C. 187.

Where one party affirmed and the other party denied a corrupt offer between them as to voting for the respondent:—Held, that the offer was not sufficiently proved. *Dundas Election (Ont.)—Cook v. Broder*, 1 H. E. C. 205.

Where in evidence of offers of bribery, an assertion on one side is met by a contradiction on the other, the uncorroborated assertion is not sufficient to sustain the charge. *West Peterboro Election (Ont.)—Scott v. Cox*, 1 H. E. C. 274.

A charge of bribery against the respondent, where the evidence was unsatisfactory and repugnant in itself, and rested more on suspicion than on clear positive proof, was held not proven. *North Ontario Election (Ont.)—McCaskill v. Paxton*, 1 H. E. C. 304.

The respondent was charged with several acts of corrupt practice. Each separate charge was supported by the evidence of one witness, and was denied or explained by the respondent. The learned judge trying the petition—Held, that if each case stood by itself, oath against oath, and each witness equally credible, and their being no collateral circumstances either way, he would have found that each case was not proved; but as each charge was proved by a credible witness, the united weight of their testimony overcame the effect of the respondent's denial; and on the combined testimony of all the witnesses, he held the separate charges proved against the respondent:—Held by the Court of Appeal (reversing Wilson, J.), that in election cases, each charge constitutes in effect a separate indictment, and if a judge on the evidence in one case dismisses the charge, the respondent cannot be placed in a worse position because a number of charges are advanced, in each of which the judge arrives at a similar conclusion, and therefore the separate charges above referred to were held not sustained. *Muskoka Election (Ont.)—Starratt v. Miller*, 1 H. E. C. 458; 12 C. L. J. 193.

The respondent was charged with corrupt practices, in that, when canvassing one C., a voter who said he would not vote unless he was paid, he said he was not in a position to pay him anything, but that if C. would support him, one of his (the respondent's) friends would come and see about it. The respondent as he was leaving the voter's house, met one K., a supporter, who, after some conversation, went into C.'s house and gave him \$5 to vote for the respondent. The charge depended upon the evidence of the voter C. and his wife. The respondent denied making such a promise; and he was sustained by K. as to a conversation outside C.'s house, in which the respondent cautioned K. not to give or promise C. any money. The election judge on the evidence found that the respondent was not personally implicated in the bribery of the voter C. by K. *Centre Wellington Election (Dom.)—Ironside v. Orton*, 1 H. E. C. 579.

Before an election judge finds a respondent or any other person guilty of a corrupt practice involving a personal disability, he ought to be free from reasonable doubt. *Id.*

A number of separate charges of corrupt practices against an agent of the respondent, based upon offers or promises, and not upon any act of such agent, each of which depended upon the oath of a witness to the offer or promise, but each one of which such agent directly contradicted, or gave a different colour to the language, or a different turn to the expressions used, which quite altered the meaning of the conversation, or constituted in effect a complete or substantial denial of the charges attempted to be proved against such agent:—Held, 1. That although in acting on such conflicting testimony, where there was a separate opposing witness in each case to the testimony of the witness supporting the charge, the election judge might be obliged to hold each charge as answered and repelled by the counter evidence, he could not give the like effect to the testimony of the same witness in each of the cases where the only opposing witness is confronted by the adverse testimony of a number of witnesses, who, though they do not corroborate one another by speaking to the same

matter, are contradicted in each case by the one witness. 2. That the more frequently a witness is contradicted by others, although each opposing witness contradicts him on a single point, the more is confidence in such witness affected, until, by a number of contradicting witnesses, he may be disbelieved altogether. 3. That acting on the above, and on a consideration whether the story told by the witness in support of the charge is reasonable or probable in itself, the charges of corrupt practices against the agent of the respondent, set out in the judgment, were proved. *North Renfrew Election (Dom.)—White v. Murray*, 1 H. E. C. 710.

Charges against the respondent, that he had promised an office to the son of a voter, and a contract to the voter himself, were contradicted by other evidence, and dismissed. *South Ontario Election (Dom.)—McKay v. Glen*, 1 H. E. C. 751; 3 S. C. R. 651.

3. Treating.

(a) Generally.

Treating at an election, in order to be criminal, must be done corruptly, and for the purpose of corruptly influencing the voter. *South Norfolk Election (Dom.)—Decow v. Wallace*, 1 H. E. C. 660.

Treating is not per se a corrupt act, except when so made by statute; but the intent of the party treating may make it so, and the intent must be judged by all the circumstances by which it is attended. *North Middlesex Election (Ont.)—Cameron v. McDougall*, 1 H. E. C. 376; 12 C. L. J. 14.

Where a charge of a corrupt intent in treating is made, the evidence must satisfy the judge, beyond reasonable doubt, that the treating was intended directly to influence the election, and to produce an effect upon the electors, and was so done with a corrupt intent. *Glengarry Election (Ont.)—McLennan v. Craig*, 1 H. E. C. 8.

Reasonable refreshments furnished bona fide to committees promoting the election are not illegal. *South Grey Election (Ont.)—Hunter v. Lauder*, 1 H. E. C. 52; 8 C. L. J., 17.

Treating, when done in compliance with a custom prevalent in the country and without any corrupt intent, will not avoid an election. *Weland Election (Ont.)—Beatty v. Currie*, 1 H. E. C. 47.

The general practice which prevails here of persons drinking in a friendly way when they meet, would require strong evidence of the profuse expenditure of money in drinking, to induce a judge to say it was corruptly done, so as to make it bribery or treating at common law. *Kingston Election (Dom.)—Stewart v. Macdonald*, 1 H. E. C. 625; 11 C. L. J. 19.

(b) By Candidates.

The treating of persons by the candidate at a tavern during his canvass—Held, under the evidence, not to be a treating of electors with corrupt motives. *London Election (Ont.)—Jarman v. Meredith*, 1 H. E. C. 214.

About an hour after a meeting of a few friends of the respondent at a tavern, one of their number was sent some distance to buy oysters for their own refreshment, of which the parties and others partook. The following day a friend of the respondent treated at a tavern, and not having change, the respondent gave him 25 cents to pay for the treat:—Held, not to be corrupt treating, nor a violation of 36 Vict., c. 2, s. 2, O. *Welland Election (Ont.)—Buchner v. Currie*, 1 H. E. C. 187.

Semble, where treating is done by a candidate in order to make for himself a reputation for good fellowship and hospitality, and thereby to influence electors to vote for him, it is a species of bribery which would avoid his election at common law. *North Middlesex Election (Ont.)—Cameron v. McDougall*, 1 H. E. C. 376; 12 C. L. J. 14.

When the respondent who, in the course of his business as a drover, had been in the habit of treating at taverns, treated during his canvass, but to a less extent than was his habit, and not apparently for the purpose of ingratiating himself with the electors:—Held, under the circumstances, that such treating was not corrupt, and his election was not avoided. *Id.*

See *Glengarry Election (Ont.)—McLennan et al. v. Craig et al.*, 1 H. E. C. 8, p. 548; *Dundas Election (Ont.)—Cook v. Broder*, 1 H. E. C. 205, p. 549.

(c) By Agents.

The furnishing of refreshment to voters by an agent of a candidate, without the knowledge or consent of the candidate and against his will, will not be sufficient ground to set aside an election, unless done corruptly or with intent to influence voters. *East Toronto Election (Ont.)—Rennick v. Cameron*, 1 H. E. C. 70; 8 C. L. J. 113.

Where the object of an agent in treating is to gain popularity for himself, and not with any view of advancing the interest of his employers, such treating is not bribery. *Id.*

One F., an agent of the respondent, on the day of the nomination of candidates to contest the election, and while the speaking was going on, treated a large number of persons at a tavern across the street from the place of the nomination, for which he paid \$7 or \$8:—Held a corrupt practice by an agent of the respondent, which avoided the election. *Dundas Election (Ont.)—Cook v. Broder*, 1 H. E. C. 205.

K., an agent, while canvassing a voter in Ward No. 6, gave him money to get beer, for which the voter paid a lesser sum, and as the voter was poor, told him to keep the change:—Held, under the circumstances, not an act of bribery. *London Election (Ont.)—Jarman v. Meredith*, 1 H. E. C. 214.

One D., who had been a candidate for various offices for twenty years prior to the election in question, and had freely employed treating as an element in his canvassing, became an agent of the respondent, and treated extensively, as was his common practice, during the election. The respondent was aware of D.'s practices, and once in the early part of the canvass, cautioned D. as to his treating, but never repudiated him as his

agent:—Held, on the evidence, that as D. did no more in the way of treating during the election than he had done on former occasions, and had employed treating as he ordinarily did as his argument, and had not used it as a means of corruptly influencing the electors, he was not guilty of a corrupt practice. *East Elgin Election (Dom.)—Blue v. Arkell*, 1 H. E. C. 769.

Semble, the treating proved in this case, if practised by one not theretofore given to such practice, would have been sufficient to have avoided the election. *Id.*

Observation on the law as it now stands, as holding out inducements to candidates to employ men who are habitual drinkers to canvass by systematic treating, and thus cause electioneering to depend upon popularity aroused by treating, rather than the merits of the candidates, or the measures they advocate. *Id.*

One M. canvassed a voter on polling day, and urged him to vote for the respondent, and, while canvassing, treated the voter four times; the voter then went and voted:—Held, that the treating was for the purpose of corruptly influencing the voter to vote or refrain from voting at the election. *North Ontario Election (Dom.)—Gibbs v. Wheeler*, 1 H. E. C. 785.

A scrutineer for the respondent had some whiskey with him on polling day, and treated the deputy returning officer, poll clerk, and another in the polling station:—Held, not a corrupt practice. *Id.*

See also Sub-head (e) *infra*.

(d) By Other Persons.

The giving of free dinners to a number of electors who had come a long distance in severe winter weather, in the absence of evidence that it was done for the purpose of influencing the election either by voting or not voting, or that such electors voted, was not a corrupt act. *North Victoria Election (2) (Dom.)—Cameron v. MacLennan*, 1 H. E. C. 671; 11 C. L. J. 163.

Certain voters met at a tavern on polling day, and one B. said he did not know how to mark his ballot. One of the voters, after shewing B. how to mark his ballot, according to the candidate he desired to vote for, treated:—Held, that the treating was not a violation of sec. 94 of the Dominion Elections Act, 1874, nor a corrupt practice under sec. 98 of the Act. *North Ontario Election (Dom.)—Gibbs v. Wheeler*, 1 H. E. C. 785.

(e) At Meetings.

The respondent who was then representing the county in the Legislature, on two several occasions at the close of public meetings of electors called by him to explain his conduct as such member, treated all present to liquor at taverns. He had not at the time made up his mind to be a candidate at the then coming election, but told the electors that "if they gave him their support he would expect it."—Held, under the circumstances, that such treating was not done with a corrupt intent. *Glengarry Election (Ont.)—McLennan et al. v. Craig, et al.*, 1 H. E. C. 8.

Quære, whether such treating was in any case a corrupt practice, under 32 Vict., c. 21, s. 61, O.; or other than an illegal act which subjected the party to a penalty of \$100 under s. 65—the statute pointedly omitting all mention of treating. *Ib.*

Violation of the Ontario Controverted Election Act, 1871, s. 61, (treating at meetings) and s. 66 (giving or selling liquor at taverns on polling day) are not corrupt practices within the meaning of the Act and of the Election Act of 1868, unless committed in order to influence voters at the election complained of. *North York Election (Ont.)—Gorham v. Boulbee*, 1 H. E. C. 62.

The respondent, who was a member of a temperance organization, held an election meeting in a locality within the electoral division, and about an hour after the meeting had dispersed, went to a tavern where he met about 10 or 15 persons in the bar-room, to whom he made the remark, "Boys, will you have something?" Nothing was then taken; but one E., a supporter of the respondent, said he would treat, and he did treat the persons present, and the respondent gave him the money to pay for the treat:—Held, 1. That as the meeting for promoting the election had dispersed an hour before the respondent went to the tavern, this was not a meeting of electors. 2. That the treating not having been done with a corrupt intent, was not an offence under 32 Vict., c. 21 s. 61, as amended by 36 Vict., c. 2, s. 2, nor at common law: Quære, whether the Treating Act, 7 Will. III., c. 4, is in force in this province. *Dundas Election (Ont.)—Cook v. Broder*, 1 H. E. C. 205.

One F., an agent of the respondent, brought a jar of whiskey to a meeting of electors assembled for the purpose of promoting the election, and gave drinks from the same to the electors present, which was held a corrupt practice, and a violation of the Ontario Election Law of 1868, as amended by the Election Act of 1873, so that the election was avoided thereby. *West Wellington Election (Ont.)—Moore v. McGowan*, 1 H. E. C. 231.

A meeting of the electors was held in a town hall, and C. (an agent of respondent) and a number of electors went from the meeting to a tavern, where they were treated by C.:—Held, 1. That this was a meeting of electors assembled for the purpose of promoting the election; and, 2. That the treating by C. was a corrupt practice, and a breach of the 32 Vict. c. 21 s. 61, as amended by 36 Vict., c. 2, s. 2. *East Peterborough Election (Ont.)—Stratton v. O'Sullivan*, 1 H. E. C. 245.

After a meeting of electors in a town hall, some friends of the respondent remained together consulting about the election, and afterwards went to a tavern, where some of them boarded, and had an oyster supper:—Held, that the evidence was not sufficient to sustain the charge that this was entertainment furnished to a meeting of electors under 32 Vict. c. 21, s. 61, O., as amended by 36 Vict. c. 2, s. 2. *North Victoria Election (Ont.)—McRae v. Smith*, 1 H. E. C. 252.

Refreshments provided at a meeting of electors, all of one political party, or at a meeting of a committee to aid in returning a candidate, by and at the expense of one or more of their number, unless in some extreme case cannot be

deemed a breach of the provisions of the statute against treating. *Halton Election (Ont.)—Russell v. Barber*, 1 H. E. C. 283.

A meeting of the electors was held at a tavern, at which both candidates were present. A dispute arose, and the meeting broke up and the parties left the room as a disorderly crowd, and began pulling off their coats and talked of fighting. A treat was proposed to quiet the people, and one F. (held by Wilson, J., to be an agent of the respondent), treated, and the crowd quieted down and dwindled away:—Held (per Wilson, J.), that the treating, under the circumstances, was not furnishing drink to a meeting of electors assembled for the purpose of promoting the election. On appeal the Court, without expressing any opinion as to the treating, held, on the evidence, that F. was not an agent of the respondent at the time of the alleged treating. *North Ontario Election (Ont.)—McCaskill v. Paxton*, 1 H. E. C. 304.

One W., a member of a political association, treated the members of the association present at a meeting in a tavern:—Held, that the members so present were electors assembled to promote the election of the respondent within s. 61 of the Election Law of 1868, and that such treating was a corrupt practice by W. *North Grey Election (Ont.)—Boardman v. Scott*, 1 H. E. C. 362; 11 C. L. J. 242.

After the nomination of candidates on the nomination day, and on another occasion, after a "meeting assembled for the purpose of promoting the election," and after the business for which the electors had assembled was over, the electors left the building in which the meeting was held and dispersed to various taverns, at which their vehicles had been put up, and then before leaving for home treated each other; and at one of the taverns the respondent himself partook of a treat:—Held, 1. Not furnishing drink or other entertainment to meetings of electors within sec. 61 of the Ontario Election Law of 1868. 2. That the meeting of electors for the nomination of candidates, is a "meeting assembled for the purpose of promoting the election." *North Middlesex Election (Ont.)—Cameron v. McDougall*, 1 H. E. C. 376; 12 C. L. J. 14.

4. Hiring Conveyances.

On the admission of the respondent's counsel the election was avoided, on the ground that agents of the respondent had, during the election, hired and paid for teams to convey voters to the polls. *Prince Edward Election (Ont.)—Anderson v. Striker*, 1 H. E. C. 45.

Held, that the hiring by an agent of the respondent of a railway train to convey voters to and from places along the line of railway where they could vote, was a payment of the travelling expenses of voters in going to and from the election, within the meaning of 32 Vict. c. 21, s. 71, O., and was a corrupt practice, and avoided the election. *North Simcoe Election (Ont.)—Sissons v. Ardagh*, 1 H. E. C. 50.

Cabs and carriages were hired for the use of committee-men and canvassers during the election and on the day of polling, with instructions to the drivers that they were not to convey voters to and from the poll. One cab was however

used for that purpose for the greater part of the day, but without the assent of the agent of the respondent, who had charge of the cab:—Held, that as the evidence did not shew that the cabs and carriages were colourably hired for the purpose of bribery or conveying voters to the poll, or that the one cab was so used with the assent of the agent of respondent, the hiring was not an illegal act within 32 Vict. c. 21, s. 71, O. *West Toronto Election (Ont.)—Armstrong v. Crooks*, 1 H. E. C. 97.

On polling day, one W. asked two voters to go with him and vote for the respondent, and he would bring them back, and they could feed their horses and have dinner. W. sent one of his horses on some of his own business, and hired from one of his voters a horse, for which W. paid him fifty cents, and then drove with the two voters to the poll:—Held, not a hiring of a horse etc., to carry voters to the poll within 32 Vict. c. 21, s. 71, nor a furnishing of entertainment to induce voters to vote for the respondent, within s. 61 of the Ontario Election Law of 1868. *North Victoria Election (Ont.)—McRae v. Smith*, 1 H. E. C. 252.

The evidence shewed that M.'s team was hired some days before the opening of the poll by C., an agent of the respondent, for the purpose of bringing two voters to the polls. M. went for the voters, returned the day previous to the polling day without the voters, and was paid fifteen dollars:—Held, that the term "six preceding sections" in sec. 98 of "The Dominion Elections Act, 1874," means the six sections immediately preceding the 98th, and therefore the hiring of a team to convey voters to the polls, prohibited by sec. 96 (1) was a corrupt practice within the meaning of sec. 98, (2) Henry, J., dissenting. *Selkirk Election (Dom.)—Young et al. v. Smith*, 4 S. C. R. 494.

The court declined, in the present state of the law, to exclude inquiry as to the payment of travelling expenses of persons going to and returning from the poll, inasmuch as such payment might amount to bribery. *North Victoria Election (Dom.)—Cameron v. Maclellan*, 1 H. E. C. 584; 10 C. L. J. 217.

Where the amounts paid for hiring teams were fair and reasonable, such hiring was not bribery under the Dominion Controverted Elections Act, 1873. Where a canvasser for the respondent received money for hiring teams, and hired from those indebted to him, and agreed with them to give them credit for the respective amounts to be paid for the teams, such an arrangement was not evidence of corrupt practices. *North Victoria Election (Dom.)—Cameron v. Maclellan*, 1 H. E. C. 612.

Money given to a person to hire a team and to go round canvassing, held, on the evidence, not bribery. *Ib.*

One L., a voter, hired a horse and cutter on the day of the election, and with M., a scrutineer for the respondent, drove to the poll and voted. The day after the polling L. and M. returned to their homes, and on the way M. gave L. \$4 to pay for the horse and cutter:—Held, 1. That the payment of \$4 having been made after the election, and not having been made corruptly to influence the voter to vote for the respondent,

was not a corrupt practice or a wilful violation of 37 Vict., c. 9, s. 96 D. 2. That M.'s agency was a limited one, and had ceased before the payment in question. *Halton Election (Dom.)—Cross v. McCraney*, 1 H. E. C. 736.

A room was procured at which private meetings were held of the friends of the respondent to promote his election, some of which meetings he attended. One W. attended these meetings, and was appointed to procure the vote of a certain voter who was absent from the riding. W. hired a vehicle to convey the voter to the poll:—Held, that W. was an agent of the respondent, and that his hiring such vehicle was a corrupt practice. *North Ontario Election (Dom.)—Gibbs v. Wheeler*, 1 H. E. C. 785.

5. Hiring Rooms.

The candidate is not restricted to his purely personal expenses, but may (if there is no intent thereby to influence voters, or to induce others to procure his return) hire rooms for committees and meetings, in connection with the election. *East Toronto Election (Ont.)—Rennick v. Cameron*, 1 H. E. C. 70; 8 C. L. J. 113.

6. Paying Canvassers.

A candidate may if there is no intent thereby to influence voters or to induce others to procure his return, employ men to act as canvassers to distribute cards and placards, and to perform similar services in connection with the election. *East Toronto Election (Ont.)—Rennick v. Cameron*, 1 H. E. C. 70; 8 C. L. J. 113.

The friends of the candidate formed themselves into committees, and some of them voluntarily distributed cards and canvassed different localities, with books containing lists of voters, noting several particulars as to promises, etc. These canvassers often met in public houses, and while there, according to custom treated those whom they found there, and thus spent their money as well as their time. On this being represented to those who had charge of the money for election expenses, the latter, in several cases, reimbursed the canvassers:—Held, that these general payments, if not exceeding what would be paid to a person for working the same time in other employments, would not be such evidence of bribery as to set aside an election. *Ib.*

The bona fide employment and payment of a voter to canvass voters belonging to a particular religious denomination, or to the same trade or business, or to the same rank in life, or to canvass voters who only understand the French or Celtic languages, is not illegal. The fact that such a voter has skill or knowledge and capacity to canvass would not make his employment illegal. *West Toronto Election (Ont.)—Armstrong v. Crooks*, 1 H. E. C. 97.

Money was paid by an agent of the respondent (\$7 each) to certain voters for canvassing, they observing that "a little money in election time was allowed for knocking around," which observation the agent considered was "going about to solicit votes." The agent denied it was paid with any corrupt intent, although his evidence was not satisfactory. The voters swore the money

was paid to their wives, and the agent was not recalled to explain it:—Held, that although such payments might be open to unfavourable interpretation, it was not, according to the evidence, inconsistent with being made without any improper motive. *Ib.*

The respondent and one M. employed one H., a lawyer and professional public speaker, to address meetings in the respondent's interest, and promised to pay H.'s travelling expenses, if it were legal to do so:—Held, (by the Supreme Court), Taschereau and Gwynne, JJ., dissenting, reversing Armour, J.,) that such a promise was not bribery. *North Ontario Election (Dom.)—Gibbs v. Wheler*, 1 H. E. C. 785; *S. C. sub nom. North Ontario Election, (Dom.)—Wheler v. Gibbs*, 4 S. C. R. 430.

Held, per Armour, J., that the hiring of orators and canvassers at an election is bribery. *Ib.*

Per Fournier, J., candidates may legally employ and pay for the expenses and services of canvassers and speakers, provided the agreement be not a colourable one intended to evade the bribery clauses of the act. Per Taschereau and Gwynne, JJ., such a payment would be illegal. *Ib.*

7. Undue Influence.

The respondent was charged with intimidating government servants during his speech at the nomination of candidates, by threatening to procure the removal of all government servants who should not vote for him, or who should vote against him. The evidence shewed that, though in the heat of debate, and when irritated by one U., he used strong language, there was no foundation for the corrupt charge: and as it should not have been made, the costs in respect of the same were given to the respondent against the petitioner. *Welland Election (Ont.)—Buchner v. Carrie*, 1 H. E. C. 187.

A candidate's appeal to his business, or to his employment of capital in promoting the prosperity of a constituency, if honestly made, is not prohibited by law. *West Peterborough Election (Ont.)—Scott v. Coz*, 1 H. E. C. 274.

Quære, whether the word "employment" used in the bribery clauses of 32 Vict. c. 21, refers to an indefinite hiring, or would include a mere casual hiring. *Ib.*

One B. claimed the right to vote in respect of his wife's property, and was told by W., an agent of the respondent, that he could not vote unless he could swear the property was his own. The voter's oath was read to him, and the agent repeated his statement, and said he would look after the voter if he took the oath. The voter appeared to be doubtful of his right to vote, and withdrew:—Held, that the agent was not guilty of undue influence. Quære, whether the act of the agent as above set out was undue influence under 32 Vict., c. 21, s. 72. *Halton Election (Ont.)—Russell v. Barber*, 1 H. E. C. 283.

One W., a voter, who was in arrears to the Crown for the purchase money of a lot of land, was canvassed by B., an alleged agent of the respondent, who told him that the government would look sharply after those in arrears for their land who did not vote for the supporters of the

government:—Held, (reversing Wilson, J.), that what occurred was a brutum fulmen, or an expression of opinion upon a subject on which every one was competent to form an opinion. Acts of agency and the decisions bearing thereon discussed. *North Ontario Election (Ont.)—McCaskill v. Paxton*, 1 H. E. C. 304.

The respondent stated at a public meeting of the electors with reference to an alleged local grievance, that he understood it to be the constitutional practice, here and in England, for the ministry to dispense as far as practicable the patronage of the constituency on the recommendation of the person who contested the constituency on the government side; and that he being a supporter of the government, would have the patronage in respect of appropriations and appointments whether elected or not:—Held, 1. That the respondent by such words did not offer or promise directly or indirectly any place or employment, or promise to procure place or employment, to or for any voter, or any other person in induce such voter to vote, or refrain from voting. 2. (reversing Wilson, J.) That the respondent was not guilty of undue influence as defined by s. 72 of the Ontario Election Law of 1868, nor as recognized by the common law of the Parliament of England. 3. That to sustain such a general charge of undue influence, it would be necessary to prove that the intimidation was so general and extensive in its operations that the freedom of election had ceased in consequence. *Muskoka Election (Ont.)—Starratt v. Miller*, 1 H. E. C. 458; 12 C. L. J. 193.

Two agents of the respondent gave a voter M. some whiskey on polling day, and took him in a boat to an island, where they stayed for some time. One of the agents then left, and the other sent M. to another part of the island for their coats. During M.'s absence the latter agent left the island with the boat, but M. got back in time to vote, being sent for by the opposite party:—Held, that the two agents were guilty of undue influence. *North Ontario Election (Dom.)—Gibbs v. Wheler*, 1 H. E. C. 785.

8. Betting.

Where in addition to corrupt acts, bets were made by agents of the respondent and others, with a number of voters who were supporters of N., the opposing candidate, the effect of the bets being that in order to win the bets, the voters must vote for the respondent:—Held, that these bets were for the purpose of getting votes for the respondent, and were corrupt practices; and that in connection with the other corrupt acts proved, they affected the result of the election; and that the election was therefore avoided. *Lincoln Election (Ont.)—Pauling v. Rykert*, 1 H. E. C. 489.

Money was given to certain voters to make bets with others on the result of the election, but as there was no evidence of a previous understanding as to the votes, such bets were not bribery. *South Norfolk Election, (Dom.)—Decow v. Wallace*, 1 H. E. C. 660.

The practice of making bets on an election condemned as like a device to commit bribery. *Ib.*

9. *Fraudulent Device.*

Shortly before polling day the respondent's agents issued a circular, the substance of which was that they had ascertained upon undoubted authority that W., an independent candidate, despairing of election himself, was procuring his friends to vote for C., the opposition candidate. W. denied the truth of this report:—Held, that this was not a "fraudulent device," within the meaning of 32 Vict., c. 21, s. 72, O., to interfere with the free exercise of the franchise of voters, *East Northumberland Election (Ont.)—Casey v. Ferrie*, 1 H. E. C. 387; 11 C. L. J. 328.

10. *Acts of Trifling Nature not Affecting result of Election.*

See *West Hastings Election (2) (Ont.)—Holden v. Robertson*, 1 H. E. C. 539, p. 541; *Dufferin Election (Ont.)—Sleightholm v. Barr*, 1 H. E. C. 530, p. 569.

11. *Accounts of Expenditure.*

When all the accounts and records of an election are intentionally destroyed by the respondent's agent, even if the case be stripped of all other circumstances, the strongest conclusion will be drawn against the respondent, and every presumption will be made against the legality of the acts concealed by such conduct. *South Grey Election (Ont.)—Hunter v. Lauder*, 1 H.E.C. 52; 8 C.L.J. 17.

A candidate in good faith intended that his election should be conducted in accordance both with the letter and the spirit of the law; and he subscribed and paid no money, except for printing. Money, however, was given by friends of the candidate to different persons for election purposes, who kept no accounts or vouchers of what they paid:—Held, that bribery would not be inferred as against the candidate, who neither knew nor desired such a state of things, from the omission of these subordinate agents to keep an account of their expenditure, especially as the law was new, and contained no provision similar to the Imperial statute, which requires a detailed statement of expenditure to be furnished to the returning officer. But it is always more satisfactory to have the expenditure shewn by proper vouchers; and if money is paid to voters for distributing cards, or for teams, or for refreshments, these will be open to attack, and judges will be less inclined, as the law becomes known, to take a favourable view of conduct that may bear two constructions, one favourable to the candidate and the other unfavourable. *East Toronto Election (Ont.)—Rennick v. Cameron*, 1 H.E.C. 70; 8 C. L. J. 113.

The Act 36 Vict., c. 2, ss. 7-12, O., requires all election expenses of candidates shall be paid through an election agent; and the Act 38 Vict., c. 3, s. 6, requires the member-elect to swear that he had not paid and will not pay election expenses except through an agent, and that he "has not been guilty of any other corrupt practice in respect of the said election." Certain payments were made by the respondent personally, and not through an election agent:—Held, that such payments were not corrupt practices:—Held, that the words "other corrupt practices"

in the member's oath meant "any corrupt practice." *West Hastings Election (Ont.)—Wesley v. Wills*, 1 H. E. C. 211.

Per Taschereau, J.—That the personal expenses of the candidate should be included in the statement of election expenses required to be furnished to the returning officer under 37 Vict. c. 9, s. 123. *Larue v. Deslauriers*, 5 S.C.R. 91.

12. *Other Corrupt Practices.*

One T., who was on the roll as an elector, and had sold his property in June, 1874, before the final revision of the Assessment Roll by the county judge, was, with the knowledge of the respondent—who was aware a doubt existed as to T.'s right to vote—given an appointment to act as scrutineer at a distant polling place, and also a certificate from the returning officer under 38 Vict. c. 3, s. 28, O., to enable T. to vote at the place where he was to act as such scrutineer, at which place T. voted without taking the voter's oaths and returned without entering upon the duties of scrutineer. On a question of law reserved on the above facts for the Court of Appeal:—Held, that the act complained of was not a corrupt practice under the statute; but under the circumstances, the court gave the respondent no costs in appeal. *West Peterborough Election (Ont.)—Scott v. Cox*, 1 H. E. C. 274.

Meetings for promoting the respondent's election were held at public houses with the object of inducing the owners to support the respondent at the election, and because the weather was cold and meetings could not be held in the open air. No evidence was given by the petitioner that equally convenient places, and such as were more proper to be used for that purpose could be obtained:—Held, that as the respondent and his friends had a legitimate motive for holding their meetings at such houses, although their other motives might not be legitimate, no corrupt act had been committed. *Kingston Election (Dom.)—Stewart v. Macdonald*, 1 H. E. C. 625; 11 C. L. J. 19.

VI. OPEN TAVERNS AND TREATING ON ELECTION DAY.

The distribution of spirituous liquors on the polling day, with the object of promoting the election of a candidate, will make his election void. *South Grey Election (Ont.)—Hunter v. Lauder*, 1 H. E. C. 52; 8 C. L. J. 17.

Held, that the violation of sec. 66 of 32 Vict., c. 21 (giving or selling liquor at taverns on polling day), is not a corrupt practice within the meaning of the Ontario Controverted Elections Act, 1871, or the Election Act of 1868, unless committed in order to influence voters at the election complained of. *North York Election (Ont.)—Gorham v. Boulbee*, 1 H. E. C. 62.

Upon questions reserved by the rota judge under the Ontario Controverted Elections Act of 1871, it appeared that H. and B. voted for respondent. H. kept a saloon, which was closed on the polling day; but upstairs, in his private residence, he gave beer and whiskey without charge to several of his friends, among whom were friends of both candidates. B., who had no

license to sell liquor, sold it at a place near one of the polls to all persons indifferently. This was not done by H. or B. in the interest of either candidate, or to influence the election, B. acting simply for the purpose of gain; and the candidate did not know of or sanction their proceedings:—Held (though with some doubt as to B.), that neither H. nor B. had committed any corrupt practice within 34 Vict. c. 3, s. 47 and therefore had not forfeited their votes; for they had not been guilty of bribery or undue influence, and their acts, if illegal and prohibited, were not done "in reference to" the election, which, under 34 Vict. c. 3, s. 47, is requisite in order to avoid a vote. *Brockville Election (Ont.)—Flint v. Fitzsimmons*, 1 H. E. C. 139; 32 Q. B. 132.

The words "illegal and prohibited acts in reference to elections," used in 34 Vict. c. 3, s. 3, mean such acts done in connection with, or to affect, or in reference to elections, not all acts which are illegal and prohibited under the election law. *Ib.*

Section 66, of 32 Vict. c. 21 (Ontario Election Law of 1868), provides that "no spirituous or fermented liquors or drinks shall be sold or given to any person" during the day appointed for polling in the wards or municipalities in which the polls are held; and by 36 Vict. c. 2, s. 1, "corrupt practice" means "any violation of s. 66 of the Election Law of 1868 during the hours appointed for polling;" and by s. 3 of the latter Act any corrupt practice "committed by any candidate at an election, or by his agent, whether with or without the actual knowledge or consent of such candidate," avoids the election. On the day of the election in question, and during the hours appointed for polling, one M., an agent of the respondent for the purposes of the election, was offered by a person unknown to him spirituous liquor (whiskey) in a bottle, which such agent, after remonstrating with such person, accepted and drank at the polling place where such agent then was. The unknown person also gave spirituous liquor from the same bottle to other persons then present:—Held, that as the legislature had, by the provisions as to the selling or giving of liquor during the hours of polling, provided for the punishment of one particular class, which was defined to be the seller or giver, it did not intend to include the other class, the purchaser or receiver, to which no reference was made, except inferentially, and that therefore such agent, as the receiver of spirituous liquor during such polling hours, was not guilty of a corrupt practice. *West Toronto Election (2) (Ont.)—Adamson v. Bell*, 1 H. E. C. 179.

One F., a tavern-keeper, was given \$5 by the respondent, and requested to appoint a scrutineer to act for the respondent at the poll on polling day. F. kept his tavern open on polling day, and various persons treated there during polling hours. Counsel for the respondent, after the evidence of the above facts had been given, admitted that F. was an agent of the respondent, and that his acts were sufficient to avoid the election:—Held, that although the court did not adjudicate that the respondent, by giving the \$5 and requesting F. to appoint a scrutineer, had constituted him an agent for all purposes, it was the practice of the court to take the admission of counsel in place of proof of agency, and

therefore the admission of counsel as to F.'s agency was sufficient. Held further, that F., as such agent, had been guilty of a corrupt practice in keeping his tavern open on polling day, and that such corrupt practice avoided the election. *Russell Election (Ont.)—Ogilvie et al. v. Baker*, 1 H. E. C. 199.

Where a member of the respondent's committee, on the day of election, invited some of his friends to his house, which was opposite the polling booth, and gave them beer, &c., during or soon after polling hours:—Held not a contravention of 32 Vict. c. 21, s. 66, O. *London Election (Ont.)—Jarman v. Meredith*, 1 H. E. C. 214.

One B. was a member of the committee at W. for the respondent's election, canvassed for him, and met him at the committee-rooms once or twice. B. was also appointed in writing by the respondent to act as scrutineer for him on the polling day, and during polling hours gave whiskey to the deputy returning officer in the polling booth:—Held, per Wilson, J., that B., while acting as such scrutineer, was not acting in his former capacity as committee-man or agent of the respondent, and that his appointment as scrutineer did not empower him to do an act of treating so as to make the respondent answerable for it. *South Ontario Election (Ont.)—Farewell v. Brown*, 1 H. E. C. 420; *S. C. sub nom. Farewell v. Brown*, 12 C. L. J. 216.

One C., a member of respondent's committee at W., partook of whiskey in the kitchen of a tavern at W. during polling hours, and also, when bringing a voter from the town of O. to the town of W. within the same electoral division) to vote at W., treated himself and the voter in O.:—Held, Draper, C. J. A., dissentiente) that C. was not guilty of corrupt practices within sec. 66 of the Ontario Election Law of 1868. *Ib.*

The respondent, on polling day and during polling hours, went to a tavern at W., and partook therein of spirituous or fermented liquor, for which he did not then pay:—Held, per Wilson, J., that he did not "sell or give" spirituous liquors within the meaning of s. 66 of the Ontario Election Law of 1868. *Ib.*

On the day of the election, and during the hours of polling, one W., an agent of the respondent, was offered a treat in a tavern within one of the polling divisions, of which such agent and others then partook:—Held, that giving a treat in a tavern during polling hours was a corrupt practice, and being an act participated in by an agent of the respondent, the election was avoided. *South Essex Election (Ont.)—McGee v. Wigle*, 1 H. E. C. 235; 11 C. L. J. 247.

The respondent, during polling hours on the polling day, met one P., a supporter of the opposing candidate, and told him he would like a drink; and both of them, not thinking it illegal, went to a tavern, and the bar being closed, P. treated the respondent in the hall of the tavern:—Held, by the Court of Appeal (reversing Gwynne, J., 1 H. E. C. 343; 11 C. L. J. 196, 296,) that the receiving of a treat by the respondent during the hours of polling, was a corrupt practice and avoided the election. Semble, per Gwynne, J., that as to the seller or giver of the treat, the only person liable to

the penalty of \$100 would be the tavern-keeper, as the statute does not authorize two penalties for the same act. *North Grey Election (Ont.)—Boardman v. Scott*, 1 H. E. C. 362; 11 C. L. J. 242.

On the polling day, and during the hours of polling, the respondent drove up to a tavern at C., where he met one S., a member of his committee, and addressing him or the assembled people, said, "Boys, this is the first time I came to C. when I dare not treat, and some one will have to treat me." S. replied that he would treat, and, with the respondent and a number of persons variously estimated at from 30 or 50 went into the tavern, where S. treated some of the people, and the respondent drank with the rest:—Held, that going into the tavern for the purposes of the treat, when the law directed that such tavern should be kept closed, and joining in and accepting such treat, was a literal as well as a substantial violation of the law, and a corrupt practice: that the concurrence of the respondent in the commission of such corrupt practice made him liable to the disqualification imposed by the statute for "a corrupt practice committed with the actual knowledge and consent of a candidate." *North Wentworth Election (Ont.)—Christie v. Stock*, 1 H. E. C. 343; 11 C. L. J. 196, 296.

One M., an agent of the respondent, treated at a tavern during polling hours on polling day. The evidence was, that decanters were put down, and people helped themselves, but there was no evidence that spirituous liquors were used. The evidence was objected to at the time, at the charge was not mentioned in the particulars, but admitted subject to the objection:—Held, 1. That the nature of the treat in the bar-room of a country tavern raised the presumption that the treat was of spirituous liquors, and was a corrupt practice, which avoided the election. 2. That had an application been made in regular form to add a particular embracing the charge, it would have been granted. *North Victoria Election (Ont.)—McRae v. Smith*, 1 H. E. C. 252.

One L., an alleged agent of the respondent, went into the tavern of one D. during polling hours on polling day, and purchased spirituous liquor, with which he treated himself and several persons there present:—Held, per Gwynne, J., that the penalties provided by s. 66 of the Ontario Election Law of 1868 apply only to the tavern-keepers, who as such is able to control what is done on his own premises in violation of the act, and that the treating by L. was not a corrupt practice. Per Draper, O. J. A., (1) That section 66 must be construed distributively. (2) That under the first part of the section the tavern-keeper is the only person who can incur the penalty, for not keeping his tavern closed during the prescribed time. (3) That under the second part of the section the persons who incur the penalty are (1) the tavern-keeper who sells liquor in violation of the statute, and (2) the purchaser who gives the liquor purchased by him to persons in the tavern. *Lincoln Election (Ont.)—Rykert v. Neelon*, 1 H. E. C. 391; 12 C. L. J. 161.

The decision of Gwynne, J., in the Lincoln case, 1 H. E. C. 391; 12 C. L. J. 161, that tav-

ernkeepers alone are liable for the violation of 32 Vict. c. 21, s. 66, O., as amended by 36 Vict. c. 2, s. 1, not approved of. *North Wentworth Election (Ont.)—Christie v. Stock*, 1 H. E. C. 343; 11 C. L. J. 196, 296.

Held, by the Court of Appeal (Draper, C. J. A., dissenting), that s. 66 of the Ontario Election Law of 1868, 32 Vict. c. 21, as amended by 36 Vict. c. 2, applies only to shop, hotel and tavern keepers, who alone are liable to the penalties for keeping open the tavern, etc., and for selling or giving spirituous liquors during the prohibited hours. *South Ontario Election (Ont.)—Farewell v. Brown*, 1 H. E. C. 420; *sub nom. Farewell v. Brown*, 12 C. L. J. 216.

Held, by the Court of Appeal, reversing Wilson, J., that the prohibition in such section (66) as to opening taverns and giving or selling liquor "in the municipalities in which the polls are held," applies to all the municipalities within the constituency, irrespective of the place where the vote is given, or to be given. *Ib.*

By 39 Vict. c. 10, s. 3, O., which is substituted for sec. 66 of the election law of 1868, tavern-keepers or persons acting in that capacity for the time, who sell or give liquor at taverns on polling day and within the hours of polling, are guilty of corrupt practices; but persons who treat or are treated at such taverns are not affected by the statute.—*Ford's vote. Lincoln Election (2) (Ont.)—Pawling v. Rykert*, 1 H. E. C. 500.

One B. was appointed, in writing, by the respondent to act as his agent for polling day. During the day he went to a tavern and asked for and was given a glass of beer:—Held, that B treated himself, and neither gave nor sold, and was not therefore guilty of a corrupt practice. *East Peterborough Election (Ont.)—Stratton v. O'Sullivan*, 1 H. E. C. 245.

The majority of the respondent was 337; but it appeared in evidence that two agents of the respondent had bribed between 40 and 50 voters: that in close proximity to the polls spirituous liquor was sold and given at two taverns during polling hours, and that one of such agents took part in furnishing such liquor; and that such agent had previous to the election furnished drink or other entertainment to a meeting of electors held for the purpose of promoting the election:—Held, that the result of the election had been affected thereby, and that the election was void. *West Hastings Election (2) (Ont.)—Holden v. Robertson*, 1 H. E. C. 539.

See *Welland Election (2) (Ont.)—Buchner v. Currie*, 1 H. E. C. 187, p. 535; *North Ontario Election (Dom.)—Gibbs v. Wheeler*, 1 H. E. C. 785, p. 548.

VII. DISQUALIFICATION BY REASON OF CORRUPT PRACTICES.

1. Of Candidates.

Before an election judge finds a respondent or other person guilty of a corrupt practice involving a personal disability he ought to be free from reasonable doubt. *Centre Wellington Election (Dom.)—Ironsides v. Orton*, 1 H. E. C. 579.

It is a general rule that no man can be treated as a criminal, or mulct in penal actions for offences which he did not connive at; and it is settled law that enactments are not to be given a penal effect beyond the necessary import of the terms used. But the election laws are not to be so limitedly construed by an election judge; and for civil purposes they are more comprehensive, and reach a candidate whose agents bribe in his behalf, with or without his authority. Where the disqualification of a candidate is sought they are to be construed as any other penal statutes, and the candidate must be proved guilty by the same kind of evidence as applies to penal proceedings. *Kingston Election (Dom.)—Stewart v. Macdonald*, 1 H. E. C. 625; 11 C. L. J. 19.

The respondent entrusted about \$700 to an agent for election purposes without having supervised the expenditure:—Held, that this did not make him personally a party within 24 Vict. c. 3, s. 46, to every illegal application of the money by the agent, or by those who received money from him. But if a very excessive sum had been so entrusted to the agent, the presumption of a corrupt purpose might have been reasonable. *South Grey Election (Ont.)—Hunter v. Lauder*, 1 H. E. C. 52; 8 C. L. J. 17.

Before subjecting a candidate to the penalty of disqualification, the judge should feel well assured, beyond all possibility of mistake, that the offence charged is established. If there is an honest conflict of testimony as to the offence charged, or if acts or language are reasonably susceptible of two interpretations, one innocent and the other culpable, the judge is to take care not to adopt the culpable interpretation unless, after the most careful consideration, he is convinced that in view of all the circumstances it is the only one which the evidence warrants his adopting as the true one. *Welland Election (2) (Ont.)—Buchner v. Currie*, 1 H. E. C. 187.

Per Burton and Patterson, J.J.A.—The 2nd sub-sec. of s. 3 of 36 Vict., c. 2, applies equally to the elected and defeated candidates at an election; and, if found assenting parties to any practice declared by the statute to be corrupt, each of them is liable to the disqualifications mentioned in the statute. *North Wentworth Election (Ont.)—Christie v. Stock*, 1 H. E. C. 343; 11 C. L. J. 196, 296.

The respondent, during polling hours on the polling day, met one P., a supporter of the opposing candidate, and told him he would like a drink; and both of them, not thinking it illegal, went to a tavern, and the bar being closed P. treated the respondent in the hall of the tavern:—Held by the Court of Appeal (reversing Gwynne, J.), that the receiving of a treat by the respondent during the hours of polling, was a corrupt practice and avoided the election. *North Grey Election (Ont.)—Boardman v. Scott*, 1 H. E. C. 362; 11 C. L. J. 242.

At a late hour on the day preceding the election some agents of the respondent determined to resort to bribery, and they carried out such determination at an early hour on the morning of the polling day. There was no evidence of the respondent's knowledge of, or consent to, this act of his agents:—Held, (reversing Gwynne, J.), that the shortness of the interval between the resolve and the execution of the bribery,

which was carried out at a place several miles away from where the respondent lived, rendered improbable the fact of the respondent's actual knowledge of such bribery. *Lincoln Election (Ont.)—Rykert v. Neelon*, 1 H. E. C. 391; 12 C. L. J. 161.

The evidence shewed that extensive bribery was practised by the agents of the respondent and by a large number of persons in his interest, but no acts of personal bribery were proved against him, and he denied all knowledge of such acts. It was in evidence that he had warned his friends, during the canvass, not to spend money illegally. The judge (dubitante) held that no corrupt practice had been committed with the respondent's knowledge or consent, and avoided the election for corrupt practices by the respondent's agents. On appeal to the Court of Common Pleas, it was:—Held, 1. That the circumstantial evidence in this case was sufficient to shew that corrupt practices had been committed by the respondent's agents with his knowledge and consent. 2. That wilful intentional ignorance is the same as actual knowledge. 3. That the assent of a candidate to the corrupt acts of his agents may be assumed from his non-interference or non-objection when he has the opportunity. And such candidate's knowledge of and assent to the corrupt acts of his agents, may be established without connecting him with any particular act of bribery. *London Election (Dom.)—Pritchard v. Walker*, 1 H. E. C. 560; 24 C.P. 434.

See *North Wentworth Election (Ont.)—Christie v. Stock*, 1 H. E. C. 345, p. 559; *Centre Wellington Election (Dom.)—Ironside v. Orton*, 1 H. E. C. 579, p. 545.

[See also 47 Vict. c. 4, Ont.]

[2. Of Other Persons.

Quære, whether the judge presiding at the trial should not direct notice to be given to the parties who, from the evidence, were apparently guilty of corrupt practices, so that he might decide upon their liability to disqualification, and report them under the statute. *Prescott Election (Ont.)—McKenzie v. Hamilton*, 1 H. E. C. 1.

The election having been declared void on account of the corrupt practices of an agent of the respondent, the judges acting as a court for the trial of illegal acts committed at the election, after notice to such agent, granted an order for the punishment of such agent by fine and disqualification. *Stormont Election (Ont.)—Empey et al. v. Kerr*, 1 H. E. C. 537.

See also *North Simcoe Election (Dom.)—Edwards v. Cook*, 1 H. E. C. 617, p. 564.

VIII. TRIAL OF CONTROVERTED ELECTIONS.

1. Court for Trial.

The Court of Queen's Bench is an existing court for the presentation and trial of Dominion controverted election cases, notwithstanding the O. J. Act, 1881. The petition in this case was intitled, "In the Queen's Bench, High Court of Justice, Queen's Bench Division," and was delivered, without any special instructions to

him, to an officer of, and in the office of the Queen's Bench Division, with whom and in which the business of the court of Queen's Bench had formerly been transacted, and the officer entered it in the procedure book of the Queen's Bench Division:—Held, that the words "High Court of Justice, Queen's Bench Division," added in intituling the petition might be rejected as surplusage, and that the petition had been properly presented in the Queen's Bench:—Held, also, that the act of the officer in entering it in a wrong book should not prejudicially affect the petition. *In re Russell Election (Dom.)*.—*Henderson v. Dickenson*, 1 O. R., Q. B. D. 439.

A petition against the return of a member for the House of Commons, was filed in the High Court of Justice, Common Pleas Division, constituted by the O. J. Act; and the required security was furnished by the deposit thereof being made in a bank under a direction obtained therefor from the accountant of the said High Court, appointed under the said Act:—Held, by *Cameron, J.*, that the Common Pleas Division of the said High Court was not one and the same court as the Court of Common Pleas as constituted prior to the passing of the Judicature Act; that the said Court of Common Pleas still existed, and was capable of receiving and trying the said petitions, and therefore, the said Common Pleas Division had no jurisdiction to entertain the same:—Held, also, that the question was properly raised by way of preliminary objection, as was also the question as to the security furnished:—Held also, that the onus of proving the preliminary objections rested on the respondent, who raised them. The question as to jurisdiction being important, and open to reasonable doubt, no costs were allowed. *Re North York Election (Dom.)*.—*Paterson v. Mulock*, 32 C. P. 458. Overruled by the Supreme Court, 8 S. C. R. 126.

Held, following the last case, that the High Court of Justice has no jurisdiction in Dominion controverted election cases. *In re West Huron Election (Dom.)*.—*Mitchell v. Cameron*, 1 O. R., Q. B. D. 433. Reversed by Supreme Court, 8 S. C. R. 126.

See *Re Niagara Election (Dom.)*.—*Plumb v. Hughes*, 29 C. P. 261; *South Ontario Election (Dom.)*.—*McKay v. Glen*; *Re West Hastings Election (Ont.)*.—*Wallbridge v. Egan*, *ib.* 270; *Montmorency Election (Dom.)*.—*Valin v. Langlois*, 3 S. C. R. 1.

2. Petition.

(a) Petitioners.

The respondent attacked the qualification of one of the petitioners on the grounds that he was an alien, and that he had no property qualification, having made an assignment in insolvency before the election. The learned Judge admitted the evidence, but Held, (1) That the evidence as to the petitioner having lived in the United States without shewing that his parents were American citizens, was not sufficient to establish the charge of alienage. (2) That the Ontario Election Act of 1868, by the term "owner," gives to the husband whose wife has an estate for life or a greater estate, the right to vote in respect of his wife's property; and that the

petitioner having that qualification, and being in possession of his wife's estate, was entitled to petition. *Prescott Election (Ont.)*.—*McKenzie et al. v. Hamilton*, 1 H. E. C. 1.

The respondent, on the opening of the case, charged that the petitioner was a candidate at the election, and as such candidate was guilty of corrupt practices, and therefore disqualified to be a petitioner. The chief justice, without deciding whether the respondent had the right to attack the qualification of the petitioner, allowed the evidence to be given, but held the same to be insufficient. *Prince Edward Election (Ont.)*.—*Anderson v. Striker*, 1 H. E. C. 45.

A petitioner in an election petition who has been guilty of corrupt practices at the election complained of, does not thereby lose his status as a petitioner. *Dufferin Election (Ont.)*.—*Sleight-holm v. Barr*, 1 H. E. C. 529; 4 A. R. 420.

Except where there are recriminatory charges against the unsuccessful candidate, or for the purpose of declaring the petitioner's vote void on a scrutiny, the conduct of a petitioner at an election cannot be inquired into. And in this case there is no distinction between a candidate-petitioner, and a voter-petitioner. *ib.*

Seem, That if the petitioner in this case was proved at the trial of the election petition to have been guilty of corrupt practices at the election complained of, the petition could not be dismissed. *ib.*

An objection to the status of a petitioner cannot be taken by preliminary objection. *ib.*

A candidate may be a petitioner although his property qualification be defective, if it was not demanded of him at the time of his election. If he claims the seat, his want of qualification may be urged against his being seated, but he may still shew that the respondent was not duly elected, if he so charge in his petition. *North Victoria Election (Dom.)*.—*Cameron v. Macleannan*, 1 H. E. C. 584; 10 C. L. J. 217.

A duly qualified voter is not disqualified from being a petitioner on the ground that he has been guilty of bribery, treating or undue influence, during the election. *North Simcoe Election (Dom.)*.—*Edwards v. Cook*, 1 H. E. C. 617; 10 C. L. J. 232.

Disqualifications from corrupt practices on the part of a voter or candidate arise after he has been found guilty, there is no relation back. *ib.*

A charge that the petition was not signed by petitioner bona fide, but that his name was used mala fide by other persons, is a matter of fact to be tried, and cannot be raised by preliminary objection. *ib.*

In order to disqualify the petitioner acting as such, the respondent offered to prove (1) that the petitioner had been reported by the judge trying a former election petition as guilty of corrupt practices. (2) that the petitioner had in fact been guilty of corrupt practices at such election; and (3) that he had been guilty of corrupt practices at the election in question:—Held, that, such evidence, if offered, would not disqualify the petitioner. *Cornwall Election (3)*.—*Macleannan v. Bergin*, 1 H. E. C. 803.

Held, further, that as the petitioner did not claim the seat, evidence could not be gone into for the purpose of personally disqualifying him. *Id.*

See *Peel Election (Ont.)—Hurst v. Chisholm*, 1 H. E. C. 485, p. 571.

(b) *Form of.*

The 6th general rule in election cases does not preclude the statement of evidence in the petition, it renders it unnecessary, and is intended to discourage such pleading. *South Oxford Election (Ont.)—Hopkins v. Oliver*, 1 H. E. C. 238; 11 C. L. J. 161.

An election petition need not shew the time at which the return of the respondent was published in the Gazette. *In re Russell Election (Dom.)—Henderson v. Dickenson*, 1 O. R., Q. B. D. 439.

(c) *Amendment of*

The judge trying an election petition has power to amend the petition by allowing the insertion of any objection to the voters' list used at the election. *Monck Election (Ont.)—Colliar et al. v. McCallum*, 1 H. E. C. 154.

On a preliminary objection to a petition claiming the seat on a scrutiny, the court declined to strike out a clause in the petition which claimed that the votes of persons guilty of bribery, treating and undue influence, should be struck off the poll. The giver of a bribe, as well as the receiver, may be indicted for bribery. *North Victoria Election (Dom.)—Cameron v. Maclellan*, 1 H. E. C. 584; 10 C. L. J. 217.

The petition, besides charging the respondent with various corrupt acts, charged one of his agents with similar acts, and claimed that the agent was subject to the same disqualifications and penalties as a candidate. The prayer of the petition asked that this agent might be made a party to the petition, and that he might be subjected to such disqualifications and penalties:—Held, (1) That there is no authority in the Election Acts or elsewhere, for making an agent of a candidate a respondent in a petition on a charge of personal misconduct on his part. (2) There is no authority given to the election court or the judge on the rota to subject a person "other than a candidate," to such disqualifications. *South Oxford Election (Ont.)—Hopkins v. Oliver*, 1 H. E. C. 238; 11 C. L. J. 161.

See *In re Prescott Election (Dom.)—9 P. R.* 481, p. 567.

3. Particulars.

(a) *Generally.*

When the petition claimed the seat for the unsuccessful candidate on the grounds that (1) illegal votes and (2) improperly marked ballots were received in favour of the successful candidate; that (3) good votes and (4) properly marked ballots for the unsuccessful candidate were improperly refused; and that (5) the successful candidate and his agents were guilty of corrupt practices, and particulars of all such votes and ballots and corrupt practices were asked from the petitioner:—Held, (1) As to the illegal votes,

that the 7th general rule prescribed the particulars of objected votes to be given, and the time of filing and delivering the same, and a special order was not therefore necessary. (2) As to the improperly marked ballots and improperly rejected ballots, the petitioner not having information respecting them, could not be ordered to deliver particulars of the same. (3) Particulars were ordered of the names, address, abode and addition of persons having good votes, whose votes were improperly rejected at the polls; and particulars of the corrupt practices charged by the petitioner against the respondent and his agents. *Beal v. Smith*, L. R. 4 C. P. 145 (Westminster case), followed. *West Elgin Election (Ont.)—Cascaden v. Munroe*, 1 H. E. C. 223; 11 C. L. J. 160.

Where particulars were delivered after the time limited by the order for particulars, and not returned, an application made at the trial to set them aside was refused; such application should have been made in chambers before the trial. *North Victoria Election (Ont.)—McRae v. Smith*, 1 H. E. C. 252.

Particulars of recriminatory charges delivered after the time limited by the order for such particulars were allowed, but the petitioner was allowed to apply for time to answer the charges therein contained, and was given such costs as had been occasioned by the granting of the application. *North Victoria Election (Ont.)—McRae v. Smith*, 1 H. E. C. 252.

The petitioner was not allowed to urge before the Court of Appeal a charge of corrupt practices against the respondent personally, which had not been specified in the particulars, or adjudicated upon at the trial of the petition. *South Ontario Election (Ont.)—Farewell v. Brown*, 1 H. E. C. 420.

The particulars not having been properly prepared, the petitioner, while obtaining the costs of the proceedings, was disallowed the costs of the particulars. *East Northumberland Election (Dom.)—Gibson v. Biggar*, 1 H. E. C. 577.

See *South Wentworth Election (Ont.)—Olmstead v. Carpenter*, 1 H. E. C. 531, p. 517.

(b) *Amendment of.*

Where a question is raised as to the sufficiency of the notice of objection to voters, the judge may amend the particulars, giving time to the party affected by the amendment to make inquiries. *Stormont Election (Ont.)—Bethune v. Colquhoun*, 1 H. E. C. 21; 7 C. L. J. 213.

At the trial of the petition, an amendment of the particulars as to corrupt practices will be allowed; and if the respondent is prejudiced by the surprise, terms may be imposed. *Welland Election (Ont.)—Beatty v. Currie*, 1 H. E. C. 47.

The respondent was elected by a majority of 23, and on the trial of an election petition, filed to set aside his election for corrupt practices and illegal votes, evidence was given by both sides on a charge not properly set out in the petitioners' particulars of corrupt practices. At the close of the evidence the respondent objected that the charge was not in the particulars, and that it was not verified by the affidavit of the

petitioners:—Held, (1) That the petitioners might amend their particulars, and that the charges in the petition were wide enough to cover the charge.

(2) That as to this charge, the parties had in fact gone into evidence without particulars, and that the petitioners' affidavit verifying the particulars was not necessary. *Lincoln Election* (2) (Ont.).—*Pauling et al. v. Rykert*, 1 H. E. C. 489.

On an application by the petitioner to amend the particulars by adding charges of bribery against the respondent personally, and his agents, his attorney made affidavit that different persons had been employed to collect information; that the new particulars only came to his knowledge three days before the application; and that he believed they were material to the issues joined:—Held, that as it was not shewn that the petitioner or the persons employed could not have given the attorney the information long prior to the application, and as it was not sworn that the charges were believed to be true, nor were they otherwise confirmed, and as the amendment might have been moved for earlier, the application should be refused. *South Norfolk Election* (Dom.).—*Decow v. Wallace*, 1 H. E. C. 660.

The evidence in support of the offer of a present, or something nice, to the wife of a voter to induce the voter to refrain from voting shewing that it had reference to a different election than the one in question, an amendment of the particulars was refused and the charges dismissed. *Halton Election* (Dom.).—*Cross et al. v. McCraey*, 1 H. E. C. 736.

See *North Victoria Election* (Ont.).—*McRae v. Smith*, 1 H. E. C. 252, p. 559.

(c) Filing.

Held, that under 37 Vict. c. 10, the filing of an election petition in the local registrar's office at L'Orignal was not a presentation of the petition within the requirements of the statute, which requires the filing to be at the head office, and that no amendment could be made to validate such petition. *In re the Prescott Election* (Ont.), 9 P. R. 481.—Hagarty.

(d) Preliminary Objections.

As the Ontario Act (R. S. O., c. 11) makes no provision similar to that in the Dominion Controverted Elections Act, 1874 (37 Vict., c. 10, Dom.), limiting the time within which preliminary objections to an election petition should be taken, the special circumstances of each case must determine whether the preliminary objections have been taken with sufficient promptitude. *Dufferin Election* (Ont.).—*Sleightholm v. Barr*, 1 H. E. C. 529; 4 A. R. 420.

Preliminary objections to an election petition under 37 Vict., c. 10, D., though presented after the expiration of five days from the service of the petition, are not void but at most irregular, and while they remain on the files of the court the petition is not at issue, and there can be no examination of the parties. *Re Bothwell Election Petition* (Dom.), 9 P. R. 485.—Osler.

See *Re North Oxford Election* (Dom.), 8 P. R. 526, p. 568; *Re North York Election* (Dom.).—

Paterson v. Mulock, 32 C. P. 458, p. 563; *In re West Huron Election* (Dom.).—*Mitchell v. Cameron*, 1 O. R. 433, p. 563.

4. Respondent's Answer.

Where a respondent had filed certain preliminary objections to the petition, which were overruled, he was not allowed to insert similar objections in his answer, and the clause containing them was struck out. The respondent cannot, in his answer, set up that the petitioner was by himself and his agents, guilty of corrupt practices, whereby he became disqualified to be a candidate. *Re North Oxford Election* (Dom.) 8 P. R. 526.—Hagarty.

The court or a judge has power on a summary application to strike out any allegations in an answer which are not an answer in law, and might be embarrassing at the trial to the petitioner. *Ib.*

5. Cross Petition.

In a Dominion Controverted Election case, a sitting member can file a cross petition only against a candidate who is not a petitioner. *Re North Oxford Election* (Dom.), 8 P. R. 526.—Hagarty.

V. (the appellant), the sitting member, against whom an election petition had been filed by L. (the respondent) an unsuccessful candidate, presented a cross-petition under the 8th sec., sub-sec. 2, of the Dominion Controverted Election Act, 1874, alleging that L. was guilty, as well by himself as by his agents, with his knowledge and consent, of corrupt practices at the said election. This cross-petition was not filed within thirty days after the publication in the Canada Gazette of the return to the writ of election by the clerk of the crown in Chancery, but within the delay mentioned in the last part of said sub-sec. 2 sec. 8 viz: fifteen days after the service of the petition upon V. complaining of his election and return. The cross-petition was met by a preliminary objection, maintained by Meredith, C. J., alleging that it was filed too late:—Held, on appeal, that the sitting member cannot file a cross-petition, within the delay of fifteen days mentioned in the last part of said sub-sec. 2 of sec. 8, against a person who was a candidate and is a petitioner. Per Fournier, Taschereau, and Gwynne, JJ., that the said extra delay of fifteen days is given only when a petition has been filed against the sitting member, alleging corrupt practices after the return. (Henry J., dissenting.) *Montmorency Election* (Dom.).—*Valin v. Langlois*, 3 S. C. R. 90.

6. Security.

A Dominion note for \$1,000 was offered as security in this case to the registrar of the Court of Chancery, who stated to the petitioners' solicitors that he could not receive it, but directed them to make payment of it through the accountant of the court in the same manner as moneys were usually paid into court. The solicitors then paid the money into the bank to the credit of the matter of the petition according to the usual practice of the Court of Chancery:—Held, that the deposit of the security, as required by

the Act, 37 Vict. c. 10, D., was properly given. *North York Election (Dom.)—Oliver et al. v. Strange*, 1 H. E. C. 749.

The deposit of \$1,000 was given to the clerk at the time of the presenting the petition, but it was afterwards paid into a bank under the direction of the accountant of the Supreme Court:—Held, that having been properly paid to the clerk, the subsequent disposition of it could not affect the petitioner. *In re Russell Election (Dom.)—Henderson v. Dickenson*, 1 O. R., Q. B. D. 439.

7. Recriminatory Charges.

Where a charge of corrupt practices by way of a recriminatory case is alleged by a respondent against a petitioner, it may be reserved until the conclusion of the petitioner's case. *North Simcoe Election (Ont.)—Sissons v. Ardagh*, 1 H. E. C. 50.

Recriminatory charges are permitted in the interest of electors, in order to prevent a successful petitioner obtaining the vacated seat if he has violated any provision of the election law. *North Victoria Election (Ont.)—McRae v. Smith*, 1 H. E. C. 252.

Particulars of recriminatory charges delivered were allowed, but the petitioner was allowed to apply for time to answer the charges therein contained, and was given such costs as had been occasioned by the granting of the application. *Ib.*

In this case J., the appellant, claimed under 37 Vict. c. 10, s. 66, that if he was not entitled to the seat the election should be declared void, on the ground of irregularities in the conduct of the election generally, and filed no counter petition, and did not otherwise comply with the provisions of 37 Vict. c. 10, the Dominion Controverted Election Act:—Held, that sec. 66 of 37 Vict. c. 10, only applies to cases of recriminatory charges and not to a case where neither of the parties or their agents are charged with doing any wrongful act. *Queen's County Election (Dom.)—Jenkins v. Brecken*, 7 S. C. R. 247.

8. Admissions of Corrupt Practices by Agents.

The respondent was elected by a majority of 261, and at the trial counsel for the respondent admitted that there was evidence capable of being produced which would have the effect of avoiding the election under R. S. O., c. 10, s. 159; and the Court on such admission declared the election void. *Dufferin Election (Ont.)—Sleight-holm v. Barr*, 1 H. E. C. 530.

Before the trial the respondent served a notice upon the petitioner, admitting that the election must be avoided on the ground of bribery by an agent without his knowledge or consent, such admission was acted upon at the trial, and the election avoided accordingly. *North Simcoe Election (Dom.)—Edwards v. Cook*, 1 H. E. C. 624.

Admissions by Counsel—See *Carleton Election (Ont.)—Lyon v. Monk*, 1 H. E. C. 6, p. 540; *Prince Edward Election (Ont.)—Anderson v. Striker*, 1 H. E. C. 45, p. 550; *Russell Election (Ont.)—Ogilvie v. Baker*, 1 H. E. C. 199, p. 558; *Cornwall Election (Ont.)—Snetzinger v. McIntyre*, 1 H. E. C. 203, p. 540.

See *South Renfrew Election (Dom.)—Banner-man v. McDougall*, 1 H. E. C. 556 p. 573; *West Northumberland Election (Dom.)—Burnham v. Kerr*, 1 H. E. C. 562, p. 571.

9. Evidence.

Held, that the writ of election and return need not be produced or proved before any evidence of the election is given. *Stormont Election (Ont.)—Bethune v. Colquhoun*, 1 H. E. C. 21; 7 C. L. J. 213.

The Court ordered the agent of a telegraph company to produce all telegrams sent by the respondent and his alleged agent during the election reserving to the respondent the right to move the Court of Appeal on the point; the responsibility as to consequences, if it were wrong so to order, to rest on the petitioner. *South Oxford Election (Ont.)—Hopkins v. Oliver*, 1 H. E. C. 243.

A witness called on a charge in the particulars of giving spirituous liquors in a certain tavern on polling day, during polling hours, cannot be asked if he got liquor during polling hours in other taverns. *Ib.*

The attorney for the respondent may be ordered out of court when a witness is being examined on a charge of a corrupt bargain for his withdrawal from the election contest, when the evidence of such witness may refer to the sayings and doings of such attorney in respect of such withdrawal. *Ib.*

Evidence of admissions made by an agent after his agency has expired, is inadmissible. *West Peterboro Election (Ont.)—Scott v. Cox*, 1 H. E. C. 274.

A candidate when examined as a witness at an election trial, may be asked his expenditure at former Provincial and Dominion elections at which he was a candidate. *North Simcoe Election (Dom.)—Edwards v. Cook*, 1 H. E. C. 624.

A commission to examine witnesses in a foreign country may be issued in the case of the trial of an election petition. *Cornwall Election (3) (Dom.)—MacLennan v. Bergin*, 1 H. E. C. 803; 8 P. R. 64.—Armour.

Allegation, that forty persons whose names were not on the voters' list who were not entitled by law to vote, did vote and voted for the respondent. Objection, that the matters alleged were not available, because the seat was not claimed for the defeated candidate, and because it could be shewn that the forty votes were cast for the respondent:—Held, though this objection came within the East Elgin Case, 4 A. R. 412, there appeared to be too much doubt about the question to strike out the allegation; for, semble, that a person who has voted without a right to do so is not entitled to the protection of the statute as to secret voting, and that an elector should not be prevented from shewing that the elected member obtained his majority through bad votes. *In re West Huron Election (Dom.)—Mitchell v. Cameron*, 1 O. R., Q. B. D. 433.

The respondent, a week before the trial, served a notice on the petitioner admitting bribery by one of his agents, and notifying the petitioner

not to incur further costs. At the trial the respondent, pursuant to the notice, gave evidence of bribery by an agent, which the court held sufficient to avoid the election. The petitioner then contended that he had a right to shew that corrupt practices had extensively prevailed, and that the respondent had been personally guilty of corrupt practices :—Held, that the functions of the court were judicial and not inquisitorial, and that no further evidence should be received on the issue as to the avoidance of the election on account of bribery by agents. But if incidentally it should appear, in the inquiry as to the personal charges against the respondent, that corrupt practices extensively prevailed, the same would be certified in the report to the speaker. *West Northumberland Election (Dom.)*.—*Burnham et al. v. Kerr*, 1 H. E. C. 562.

10. *Withdrawal of Charge or Petition.*

The court recommended the petitioner to withdraw his petition in this case ; and on an application for that purpose, another elector having applied to be substituted as a petitioner :—Held, per Burton, J.A., that as the Court of Appeal had been placed in possession of all the charges against the respondent, and of the evidence in support of them, and had recommended the withdrawal of the petition, and no sufficient additional grounds having been shewn for such substitution of petitioner, the order for the withdrawal of the petition should be granted. *Peel Election (Ont.)*.—*Hurst v. Chisholm*, 1 H.E.C. 485.

Semble, if evidence shewed that corrupt practices had been committed by a respondent, it would be the duty of the court so to adjudicate whether the petitioner was willing to withdraw the charge or not. *South Renfrew Election (Dom.)*.—*Bannerman v. McDougall*, 1 H. E. C. 556 ; 10 C. L. J. 286.

11. *Costs.*

The petition was dismissed, but owing to the unwise and imprudent acts of the respondent, he was allowed only one half of the taxable costs. *Glenarry Election (Ont.)*.—*McLennan v. Craig*, 1 H. E. C. 8.

Where bribery by an agent is proved, costs follow the event, even though personal charges made against the respondent have not been proved, there having been no additional expense occasioned to the respondent by such personal charges. *South Grey Election (Dom.)*.—*Hunter v. Lauder*, 1 H. E. C. 52 ; 8 C. L. J. 17.

The petitioner having been warranted in continuing the enquiry as to the personal complicity of the respondent with the illegal acts of his agents, was held entitled to the full costs of the trial. *Kingston Election (Dom.)*.—*Stewart v. MacDonald*, 1 H. E. C. 625 ; 11 C. L. J. 19.

There being no grounds for charging the respondent personally with corrupt practices, and the scrutiny having been abandoned, the costs of those parts of the case were ordered to be paid by the petitioner. But with respect to the other costs, though the respondent was successful, the matters were proper to be inquired into in the public interest, and each party was left to

pay his own costs. *East Toronto Election, (Ont.)*.—*Rennick v. Cameron*, 1 H. E. C. 70 ; 8 C. L. J. 113.

The election was sustained, but it being in the public interest that the matters brought forward should have been inquired into, and as the respondent had not exercised supervision over the expenditures in connection with the election the petition was dismissed without costs. *West Toronto Election (Ont.)*.—*Armstrong v. Crooks*, 1 H. E. C. 97.

The petitioners were ordered to pay the costs of the respondent up to the meeting of the Election Court, and the costs of the special case ; but as to the costs of the trial, each party was ordered to pay his own costs. *Monck Election (Dom.)*.—*Colliar v. McCallum*, 1 H. E. C. 154.

The respondent was charged with intimidating government servants during his speech at the nomination of candidates, by threatening to procure the removal of all government servants who should not vote for him, or who should vote against him. The evidence shewed that, though in the heat of debate, and when irritated by one U., he used strong language, there was no foundation for the corrupt charge ; and as it should not have been made, the costs in respect of the same were given to the respondent against the petitioner. *Welland Election (2) (Ont.)*.—*Buchner v. Currie*, 1 H. E. C. 187.

The respondent was ordered to pay the costs of the petition and trial, except the costs of certain issues found in favour of the respondent, part of which costs were to be paid by petitioner to the respondent ; and as to part, each party was ordered to bear his own. *Id.*

The costs of investigating charges of bribery against the respondent's election agent, though not established, were awarded against the respondent, owing to the equivocal conduct of his agent in the matters which led to the charges ; also the cost of other charges of bribery which were not established, and the costs of proving that several tavern-keepers, for their own profit, had violated sec. 66 of the Election Law of 1868, as the witnesses who gave evidence of these matters also gave evidence of other matters, as to which it was reasonable they should be subpoenaed. *West Wellington Election (Ont.)*.—*Moore v. McGowan*, 1 H. E. C. 231.

The petitioner was declared entitled to the general costs of the inquiry, and the costs of the evidence incurred in proof of the facts upon which the election was avoided ; but the costs incurred in respect of charges which the petitioner failed to prove were disallowed. *South Essex Election (Ont.)*.—*McGee v. Wigle*, 1 H. E. C. 235 ; 11 C. L. J. 247.

During the progress of a scrutiny of votes, certain ballot papers, counterfoils, and a voters' list were stolen from the court, which had the effect of rendering the proceedings in the scrutiny useless. And in disposing of the costs the court ordered the respondent to pay the costs up to the date the election was avoided, but that, under the circumstances, each party must bear his own costs of the scrutiny. *Lincoln Election (2)*.—*Pauling v. Rykert*, 1 H. E. C. 489.

Held, that as the petition had been rendered necessary by the mistakes of the deputy returning

officers, for which neither the petitioner nor respondent was responsible, each party should bear his own costs. *Russell Election* (2) (Ont.)—*Baker v. Morgan*, 1 H. E. C. 519.

Various acts of bribery and of colourable charity having been proved against the agents and sub-agents of the respondent, the election was set aside, with costs, including the costs of the evidence on the personal charges against the respondent. *Cornwall Election* (Dom.)—*Bergin v. Macdonald*, 1 H. E. C. 547; 10 C. L. J. 313.

The respondent sought to establish, on an inquiry under a preliminary objection, that the petitioner (the opposing candidate) had been guilty of bribery, and was therefore disqualified as such. The inquiry was not concluded, as during its pendency the English Election Courts held that bribery would not disqualify a petitioner; but so far as the evidence went, while it disclosed such a large expenditure of money by the petitioner and his agents as to lead to the suspicion it was not all expended for the legitimate purposes of the election, it did not shew bribery by the petitioner. The respondent then consented to his election being avoided on the ground of bribery by one of his agents without his knowledge or consent:—Held, that the general rule as to costs should prevail, and that the respondent should pay the costs of the inquiry as well as the general costs of the cause. *South Renfrew Election* (Dom.)—*Bannerman v. McDougall*, 1 H. E. C. 556; 10 C. L. J. 286.

The election was set aside with costs, except as to the costs of certain charges which were unwarranted. A party, though successful, is not entitled to the costs of all the witnesses he may subpoena, nor is the fact of them being called or not called the test of such costs being taxable. *Niagara Election* (Dom.)—*Black et al. v. Plumb*, 1 H. E. C. 568.

The petitioners, after a notice from the respondent admitting bribery by one of his agents, examined witnesses on the personal charges, which were not proved, and in determining the question of costs, it was held, that as the petitioners might have come to the court on the notice served by the respondent, and have asked to have the election set aside, and as they had attempted, but had failed, to establish the personal charges, the respondent should only pay such costs as he would have had to pay had the petitioners accepted the notice served upon them before the trial. *West Northumberland Election* (Dom.)—*Burnham v. Kerr*, 1 H. E. C. 562.

From the judgment on the personal charges the petitioner appealed; but the court, on a review of the evidence, declined to set aside the finding of the election judge. The appeal was dismissed without costs, as the petitioner had strong grounds for presenting it. *South Huron* (Dom.)—*Ritchie v. Cameron*, 1 H. E. C. 576.

The particulars not having been properly prepared, the petitioner, while obtaining the costs of the proceedings, was disallowed the costs of the particulars. *East Northumberland Election* (Dom.)—*Gibson v. Biggar*, 1 H. E. C. 577.

The petitioner was held entitled to the general costs of the petition, except as to the cases of

the voters whose names were not on the voters' lists, and as to the scrutiny of ballots. *North Victoria Election* (2) (Dom.)—*Cameron v. Maclellan*, 1 H. E. C. 671; 11 C. L. J. 163.

It is not a champertous transaction that an association of persons, with which the petitioner was politically allied, agreed to pay the costs of the petition. Even if the agreement were champertous, that would not be a sufficient reason to stay the proceedings on the petition. *North Simcoe Election* (Dom.)—*Edwards v. Cook*, 1 H. E. C. 617; 10 C. L. J. 232.

The returning officer having acted honestly and fairly in rejecting the nomination paper, each party to the petition was left to bear his own costs. *South Renfrew Election* (2) (Dom.)—*McKay v. McDougall*, 1 H. E. C. 705.

The petitioner was held entitled to costs of the charges on which he succeeded, and the respondent to the costs of the charges on which the petitioner failed. *North Renfrew Election* (Dom.)—*White v. Murray*, 1 H. E. C. 710.

Where there had been excessive treating by an agent but not used as a means of corruptly influencing the voters, the petition was dismissed without costs, following the rule laid down in the Carrickfergus Case, (1 O'M. & H. 214.) *East Elgin Election* (Dom.)—*Blue v. Arkell*, 1 H. E. C. 769.

The petitioner was allowed his costs, but not the costs of the charges which he failed to establish. *Cornwall Election* (3) (Dom.)—*Maclellan v. Bergin*, 1 H. E. C. 803.

See *North York Election* (Ont.)—*Gorham et al. v. Boulbee*, 1 H. E. C. 62, p. 529; *West Peterborough Election* (Ont.)—*Scott v. Cox*, 1 H. E. C. 274, p. 556. See also *Prescott Election*, 32 Q. B. 303; *North Victoria Election*—*Cameron v. Maclellan*, 39 Q. B. 147.

12. Reserving Special Case.

A special case may be reserved for the opinion of the Court of Queen's Bench only when the judge presiding at the election trial has a serious doubt as to what the law is; or believes that the court might entertain a different opinion from that of the election judge. *North York Election* (Ont.)—*Gorham et al. v. Boulbee*, 1 H. E. C. 62.

Quære, whether, under 34 Vict., c. 3, s. 20, the rota judge has power, before the close of the case to reserve questions for the court. *Brockville Election* (Ont.)—*Flint v. Fitzsimmons*, 1 H. E. C. 139; 32 Q. B. 132.

Where a class of persons affected by the decision of a case is numerous, and the question involved is one of general importance, the judge may reserve a special case for the opinion of the Court of Queen's Bench and the judge here decided to take that course. The petitioner, after such special case had been reserved, appeared before the judge trying the election petition, and consented to abandonment of the special case and the dismissal of the petition with costs, and it was so ordered. *West York Election* (Ont.)—*Grahame v. Patterson*, 1 H. E. C. 156.

13. *New Trial.*

See *Peel Election (Ont.)—Hurst v. Chisholm*, 1 H. E. C. 485, *infra*.

14. *Judges Report.*

The judge's report to the speaker as to those persons "other than the candidate," who have been proved guilty of corrupt practices, is not conclusive, so as to bring them within 34 Vict., c. 3, s. 49, O., and so render them liable to penal consequences. *South Oxford Election (Ont.)—Hopkins v. Oliver*, 1 H. E. C. 238; 11 C. L. J. 161.

The definition of "corrupt practices" in sec. 3. and the effect of the report of election judges to the speaker, under sec. 20 of the Controverted Elections Act of 1873, considered. *North Victoria Election (Dom.)—Cameron v. Maclellan*, 1 H. E. C. 584; 10 C. L. J. 217.

15. *Practice in Appeal.*

The petitioner was not allowed to urge before the Court of Appeal a charge of corrupt practices against the respondent personally, which had not been specified in the particulars, or adjudicated upon at the trial. *South Ontario Election (Ont.)—Farwell v. Brown*, 1 H. E. C. 420; S. C., *sub nom. Farwell v. Brown*, 12 C. L. J. 216.

In penal statutes, questions of doubt are to be construed favourably to the accused, and where the court of first instance in a quasi criminal trial has acquitted the respondent, the appellate court will not reverse his finding. *North Ontario Election (Ont.)—McCaskill v. Paxton*, 1 H. E. C. 304.

Charges of corrupt practices, consisting of promises of money and of employment, were made against the respondent and one M., his agent. Both the respondent and his agent denied making any promises of money, but left the promises of employment unanswered; and the judge trying the petition (*Draper, C. J. A.*) so found, and avoided the election. Thereupon the respondent appealed to the Court of Appeal, and under 38 Vict. c. 3, s. 4, offered further evidence by affidavit, specially denying any offer or promise, directly or indirectly, of employment. *Draper, C. J. A.*, who tried the petition, having intimated to the court that had the respondent and his agent made the explicit denial as to offers of money or employment which it appeared they had intended making, he would have found for the respondent:—Held, under these circumstances, that the finding of the Election Court should be set aside, and that a new trial should be held before another judge on the rota. Observations on the difference between an election trial and a trial *à nisi prius*. *Peel Election (Ont.)—Hurst v. Chisholm*, 1 H. E. C. 485.

On a charge that the respondent offered to bribe the wife of a voter by a "nice present," if she would do what she could to prevent her husband from voting, three witnesses testified to the offer; the respondent denied, and another witness who was present heard nothing of the offer. On this evidence, and there being no proof that the witnesses in support of the charge were actuated from malicious motives or corrupt expecta-

tion, nor any evidence impeaching their veracity, the charge was held proved. The respondent appealed to the Court of Appeal on the finding of the learned chief justice on the above charge of personal bribery. Held, 1. That an appellate court will not, except under special circumstances, interfere with the finding of the court of first instance on questions of fact depending on the veracity of witnesses and conflicting evidence. 2. That as the judge trying the petition had found that the respondent had made the offer to the wife of the voter in the manner above stated, such an offer was a promise of a "valuable consideration," within the meaning of the bribery clauses of 32 Vict. c. 21. *Halton Election (Ont.)—Russell et al. v. Barber*, 1 H. E. C. 283; S. C. *sub nom. Harris v. Barber*; 11 C. L. J. 273.

The charge upon which this appeal was principally decided was that of the respondent's bribery of one David Asselin. The learned judge who tried the case found, as a matter of fact, that the appellant had underhandedly slipped into Asselin's pocket the \$5 for a pretended purpose, that was not even mentioned to the recipient; that this amount was not included in the published return of his expense as required by the Election Act, and this payment was bribery;—Held, that an appellate court in election cases ought not to reverse on mere matters of fact, the findings of the judge who has tried the petition, unless the court is convinced beyond doubt that his conclusions are erroneous, and that the evidence in this case warranted the finding of the court below, that appellant had been guilty of personal bribery. *Bellechasse Election (Dom.)—Larue v. Deslauriers*, 5 S. C. R. 91.

See also *North Ontario Election (Dom.)—Wheler v. Gibbs*, 3 S. C. R. 374.

16. *Other Cases.*

When a rule of court has been issued under the Controverted Elections Act, appointing a place for the trial not within the constituency the election for which is in question, the judge by whom the petition is being tried, has no power to adjourn, for the further hearing of the cause, from the place named in the rule of court to a place within such constituency. *South Grey Election (Ont.)—Hunter v. Lauder*, 1 H. E. C. 52; 8 C. L. J. 17.

The effect of s. 30 of 34 Vict., c. 3, O., is that the judge is to act on the principles upon which election committees in England have acted where he has no light from the rules which his own professional experience supplies him with; and he is in addition to be bound by the decisions of the rota judges in England trying elections under Acts similar to our own, in the same way as the courts feel bound by their judicial decisions in other legal matters. *West Toronto Election (Ont.)—Armstrong v. Crooks*, 1 H. E. C. 97.

Where in ordinary cases there is evidence to go to a jury, but on which the judge, if sitting as a juror, would find for the defendant; in similar cases in election trials he ought to find against the charge of bribery. *Id.*

The day appointed for the trial of an election petition may be altered to an earlier day by con-

sent of the parties, and by an order of the judge. *West Elgin Election (Ont.)—Cascaden v. Munroe*, 1 H. E. C. 227.

Where the right of the petitioner to claim the seat is decided adversely in one case, it is no prejudice to the respondent's case that other charges against the petitioner are not pronounced upon. *North Victoria Election (Ont.)—McRae v. Smith*, 1 H. E. C. 253.

The court cannot grant an interim certificate declaring an election void, as the statute contemplates only one certificate to the speaker, certifying the result of the election trial. *Lincoln Election (2) (Ont.)—Pauling v. Rykert*, 1 H. E. C. 489.

PARTICULARS.

- I. IN ACTIONS FOR LIBEL OR SLANDER—See DEFAMATION.
- II. IN SUITS FOR ALIMONY—See HUSBAND AND WIFE.
- III. IN ELECTION TRIALS—See PARLIAMENTARY ELECTIONS.

Particulars are no part of the record. See *Davidson v. The Belleville and North Hastings R. W. Co.*, 5 A. R. 315, p. 168.

The particulars of claim upon a writ of summons specially endorsed to which the defendant appears, do not bind the plaintiff as particulars under a declaration on the common counts, and, in such a case, he must comply with a demand for particulars made by the defendant. *Huggins v. Guelph Barrel Co.*, 8 P. R. 170.—Dalton, Q. C.

PARTIES.

TO ACTIONS AND SUITS—See PLEADING.

PARTITION.

- I. PRACTICE, 577.
- II. WHEN PARTITION AWARDED, 579.
- III. COSTS AND COMMISSION, 579.

I. PRACTICE.

Where in a partition suit commenced by summary application under G. O. Chy. 640, the infants interested in the estate had been joined as plaintiffs, and a sale of the land had taken place by public auction :—Held, that the infants were improperly joined as plaintiffs; that they should have been defendants and represented by the official guardian; and a reference was directed to the master to fix the guardian's commission as if he had been engaged in the suit from the beginning. On consent of the guardian, it was ordered that the proceedings taken for sale, if they proved to be regular, should stand; but this was not to be a precedent. *Brown v. Brown*, 9 P. R. 245.—Proudfoot.

Under G. O. 640, where special circumstances are shewn on an application for partition or sale of lands, a reference to a master other than the master in the county town of the county where the lands are situate will be directed. The application under the order should be made to a judge in chambers. *Re Arnott—Chatterton v. Chatterton*, 8 P. R. 39.—Proudfoot.

After an order for partition of lands in the county of Peel had been granted by a master under G. O. 641, an order was made by a judge in chambers to include in said order lands in another county, though such lands were known of at the time the partition order was made. The costs of the application were allowed, exclusive of the usual commission under G. O. 643. *Clark v. Clark et al.*, 8 P. R. 156.—Spragge.

A notice of motion for partition having been served, the plaintiff moved for an injunction restraining the defendant from collecting rents, and for a receiver. It appeared that the defendant was a stranger, whose right to be in possession was denied :—Held, that no relief could be had against him without bill filed. *Young v. Wright*, 8 P. R. 198.—Blake.

The jurisdiction created by G. O. 640, is intended to be exercised in simple cases only where there is no dispute. Where questions are raised of title, or the like, a bill must be filed. *Macdonell v. McGillis*, 8 P. R. 339.—Blake.

The fact that an intestate whose estate is being partitioned, has been dead for forty-five years, does not warrant the master in dispensing with the usual advertisement for creditors. *Biggar v. Biggar*, 8 P. R. 488.—Blake.

The defendant who occupied the property in question, in a partition suit, claimed an absolute title by possession under the statute of limitations. The master, notwithstanding, continued the inquiry, and proceeded to take evidence. Spragge, C., directed the plaintiff to file a bill within two weeks, and the parties to go to a hearing at the then ensuing sittings at Cornwall, costs to be costs in the cause. *Re McMillan—Patterson v. McMillan*, 8 P. R. 546.

A decree for partition issued by a local master at the instance of a purchaser at sheriff's sale under an order made by a county court judge where the interest which had been sold was that of one of four tenants in common in an equity of redemption in land, which was subject to two mortgages in different hands, was on appeal reversed with costs. *Wood v. Hart*, 28 Chy. 146.

In a partition suit an order allowing substitutional service of the bill, on the official guardian of an infant defendant, resident without the jurisdiction of the court, was granted on the ground that the share of the infant in the lands in question amounted to only \$40, and substitutional service would be inexpensive. *Weatherhead v. Weatherhead*, 9 P. R. 96.—Stephens, Referee.

On an application for the sale of infants' estate worth about \$400, under R. S. O. c. 40, an order was made dispensing with the examination of two of the infants who were out of the jurisdiction. *Re Lane*, 9 P. R. 251.—Boyd.

An application to consolidate two motions for administration and partition pending before a

local master, should be made to him and not to a judge in chambers. *Lambier v. Lambier*, 9 P. R. 422.—Boyd.

II. WHEN PARTITION AWARDED.

The plaintiff, being a trustee for sale, was held not to be in a position to ask for partition. *Keefer v. McKay*, 29 Chy. 162.

An application for partition or sale of land by plaintiff as one of several heirs was dismissed with costs where the plaintiff before making it knew that a defendant was in possession claiming title to the exclusion of the plaintiff and his coheirs. *Hopkins v. Hopkins*, 9 P.R. 71.—Boyd.

An order for partition of the realty was refused, when the application was made within six months of the death of the person whose estate was sought to be partitioned. The rule laid down by the Partition Act, R. S. O. c. 101, s. 6, held applicable. *Grant v. Grant*, 9 P. R. 211.—Boyd.

A tenant for life is entitled to a partition, and where there is a right to a partition there may be a right to a sale as the Court may determine. *Lalor v. Lalor*, 9 P. R. 455.—Proudfoot.

Quære whether the appellant in this case, whose only interest was that of mortgagee of the interest of one S. the owner of an undivided one-sixth interest in the lands, had any locus standi to bring a suit for partition or to appeal without his co-plaintiff. *Laplante v. Scamen et al.*, 8 A. R. 557.

III. COSTS AND COMMISSION.

Where a master in his discretion fixes the commission to be allowed to parties under G.O. 643, and settles the disbursements in the suit, there is an appeal to a judge in chambers from his finding. The disbursements should still be submitted to the master in ordinary for revision like other bills of costs. *Campbell v. Campbell*, 8 P. R. 159.—Blake.

An order for partition or sale was made under G.O. 640, by the master at London, of the estate of one M., deceased. In proceeding under that order the master advertised for creditors, and M. & M. sent in a claim for obtaining letters of administration, and for defending an action in the Court of Common Pleas, brought by W. M., a defendant in this suit, and entitled to a share of the estate against the administratrix. The master allowed the claim, and W. M. appealed, on the ground that they were not entitled to prove as creditors in this cause:—Held, that she was justified in defending the suit, and the appeal was dismissed. *McKay v. McKay*, 8 P. R. 334.—Proudfoot.

In partition and administration suits, the commission in lieu of costs should be divided into equal fractional parts, and the parts allotted to the solicitors in proportion to the amount of work done by and the responsibility imposed upon them. *Dodge v. Clapp*, 8 P. R. 388.—Proudfoot.

Objection to the commission allotted may be raised on a motion for distribution without previous notice of appeal being given. *Ib.*

On a motion for distribution, under the report of the master, an application was made on behalf of the plaintiff for the allowance of a lump sum for the costs and disbursements of the motion. Boyd, C., made the usual order, and declined to allow any sum for costs and disbursements, over and above the amounts found in the report. *Re Fleury—Fleury v. Fleury*, 9 P. R. 87.

The sum allotted to the guardian of infants for commission in partition suits should not be measured only by the work done in the master's office. *Cameron v. Lerouz*, 9 P. R. 304.—Proudfoot.

See *Clark v. Clark et al.*, 8 P. R. 156, p. 573; *Brown v. Brown*, 9 P. R. 245, p. 577.

PARTNERSHIP.

I. LIABILITY OF PARTNERS TO OTHERS.

1. *As to Bills and Notes*, 580.
2. *Other Cases*, 581.

II. PARTNERSHIP CONTRACT, 581.

III. POWER OF PARTNERS, 584.

IV. ACTION FOR PARTNERSHIP ACCOUNT, 584.

V. DISSOLUTION.

1. *Payment of Debts*, 584.

VI. DEATH OF PARTNER, 584.

VII. ACTIONS AND PROCEEDINGS AGAINST, 584.

VIII. PROOF OF PARTNERSHIP DEBTS IN INSOLVENCY PROCEEDINGS—See BANKRUPTCY AND INSOLVENCY.

IX. QUALIFICATION AS VOTERS IN RIGHT OF PARTNERSHIP PROPERTY—See PARLIAMENTARY ELECTIONS.

I. LIABILITY OF PARTNERS TO OTHERS.

1. *As to Bills and Notes*.

A promissory note for \$6,200, made by the president and secretary of a syndicate formed for completing the Hamilton and Dundas street railway, in favour of O. S. and the defendants, was endorsed by them to the Bank of Commerce or order. On the day the note fell due O. and S. respectively paid the same, O. paying \$2000, and S. \$4200, the remaining sum due thereon, S. at the time directing the bank agent to endorse it to the plaintiff, who it appeared gave no value for it. The agent endorsed it as follows: "Pay to J. S." the plaintiff "or order. D. Hughes Charles, Manager." The plaintiff thereupon sued the defendants as endorers:—Held, that the plaintiff could not recover, for the evidence shewed that S. by his payment intended to satisfy the note, which being made for a purpose directly relating to and not collateral to the partnership of which S. and defendants were partners, S. could not recover against defendants thereon, and as the plaintiff was found to have only the same right as S., neither could he recover. *Small v. Riddell et al.*, 31 C. P. 373.

Held, that a third person holding a note for the benefit of one joint endorser, cannot maintain a joint action against the co-endorsers under R. S.

O. c. 116, ss. 2, 3, as endorers for the full amount of the note, but must sue each separately in a special action for his share of the contribution:—Held, also, that the Act does not refer to partnership transactions. Quære, whether the endorsement as made by the manager, was sufficient. *Id.*

The plaintiff, knowing that the defendants were a firm of solicitors, advanced to one A. money upon a joint note signed by him and by one of the defendants in the firm's name, without the knowledge or consent of his partner. No usage or general mutual authority to sign notes in the name of the firm was proved, and it was admitted that the plaintiff had no knowledge of the transactions relied upon to shew such authority. A verdict was given for defendants in the County Court, and a rule nisi to set it aside refused:—Held, that the plaintiff could not recover against both defendants, but that the defendant who signed the note was liable; and the court, having no power on an appeal from the County Court to amend the record, allowed the appeal on payment of costs by the appellant, so far as to direct the issue of a rule nisi, upon the return of which in the court below, the necessary amendment could be made. *Semble*, per Burton, J. A., that even in the case of a trading partnership, a partner has no implied power to give the partnership name to secure the debt of a third person. *Wilson v. Brown et al.*, 6 A.R. 411.

2. Other Cases.

Where S., a partner, had contracted in writing in the partnership name, to sell certain timber limits, property of the partnership, but standing in his name only, and M., his co-partner, when informed thereof, had not dissented, but had shortly afterwards furnished information to the purchaser, which he was only entitled to ask for as such purchaser:—Held, having regard to all these circumstances, S. had assented to the said contract, and was bound thereby. It appeared also, that S., who was the managing partner, and the purchaser subsequently put an end to the terms of credit, and agreed to a cash payment of \$15,500, part of the purchase money:—Held, it was competent for them so to do, and within the power of S., so far as his co-partner was concerned. *Reid v. Smith*, 2 O. R., Chy. D. 69.

Liability of solicitor for fraudulent conduct of partner. See *Re McCaughey and Walsh, Solicitors*, 3 O. R. 425, p. 40.

See also *Birkett et al v. McGuire et al*, 7 A. R. 53; 31 C. P. 430.

II. PARTNERSHIP CONTRACT.

The plaintiff and defendants M., having on hand large contracts to fulfil, entered into partnership with the defendant W., under the style of J. W. & Co. The articles of agreement which were drawn in the province of Quebec, declared that the plant, which the plaintiff contributed to the partnership, should become the property of the said firm, that is to say, "the one-half thereof shall revert to and belong to the plaintiff and defendants M., and the other half to W." The law of Quebec was proved to be that if nothing were provided by the articles as to the ownership of the plant, it would be taken out of the

partnership at the conclusion of the same by the party who had contributed it, before division of profits. The plaintiff and the defendants M. all swore that the intention was, that they should receive credit for the plant as their property in the accounts of the partnership. It was shown also that in the treaty for the partnership inventories of the plant were drawn and its value was discussed, the plaintiff putting it at \$57,130, W. consenting to it being placed at \$40,000. The notary who drew the articles swore that if it had been intended to make a transfer of the property in the plant, he would have expressed such intent more explicitly. The book-keeper swore that the plaintiff had claimed credit in the books for the plant from the first, and that in discussing the matter with W. a reason had been suggested for not immediately giving such credit, that the plant was under mortgage:—Held, that upon the true construction of the articles of partnership as drawn the plant was withdrawn from the operation of the law of Quebec as proved, its ownership being expressly provided for by the instrument; but that the evidence given by the parties other than W. was clear and satisfactory, that a mistake had been made in drawing the same, and that the articles should have been reformed so as to entitle the plaintiff to credit for the plant in taking the accounts; and on this ground the judgment of the court below was reversed. *Macdonald v. Worthington et al.*, 7 A. R. 531. But see *Worthington v. McDonald*, 20 C. L. J. 67.

Eight persons, who had previously been engaged in the cattle trade, held a meeting in the month of October, 1880, and passed a series of resolutions, prefaced by the declaration that they and four others, whose names were mentioned, proposed to form a cattle dealers' syndicate for the purpose of exporting cattle, to commence with the opening of navigation, from Portland. The resolutions provided that each member of the syndicate should make a deposit of \$5,000 to the credit of the representative of each company: That no member of "this firm" should do any business outside of the syndicate in export cattle except for the benefit "of the company." That no member of the syndicate should appoint any person to buy cattle except approved of by the majority of the members: That each member should take the position assigned him by the majority of the syndicate: That the syndicate should be divided into two companies, each to consist of six members (whose names were mentioned): That no member should be admitted to the syndicate without the approval of all the members: That none of the cattle space which was then taken should be sub-let without the approval of the syndicate: That the profit or loss should be equally divided, share and share alike, between all the members of the syndicate. All the contemplated members of the proposed syndicate except one signed the resolutions. One of the firms was already in existence, the other was to be thereafter formed. The one already existing comprised six members of the proposed syndicate, and was called Thompson & Co., the other subsequently formed was composed of five members of the proposed syndicate, and was called Craig & Co. These two firms proceeded to buy and export cattle; each opened separate bank accounts. The firm of Craig & Co., dealt with the plaintiffs and

obtained advances. From the evidence it appeared that the plaintiffs had knowledge of the resolutions above referred to, but opened the account solely with the firm of Craig & Co., and the members of that firm, from whom alone they took security; and it appeared by the evidence that, notwithstanding the form of the resolutions, the arrangement contemplated thereby was treated by the parties as still open and as a matter of negotiation to be completed by some future agreement between the parties, and to perfect which meetings were from time to time held; and afterwards, at a subsequent meeting of some of the members of the firm of Craig & Co., and Thompson & Co., on 20th April, 1881, a formal agreement was drawn up, purporting to be made between the individuals composing the firm of Thompson & Co., of the first part, and the individuals composing the firm of Craig & Co. of the second part, which provided for the two firms carrying on their business of cattle exporters in co-operation with each other, and for dividing between the two firms the net profits and losses of the two firms respectively, from 6th December, 1880, and containing a declaration that neither company should be liable for any debts or liabilities of the other company, and that nothing therein contained should create a partnership between the two companies. This agreement was signed by all the parties except two of the members of Thompson & Co., who refused to sign it. The two firms continued to carry on business as cattle exporters, each on its own account. A paper purporting to be a copy of the agreement was furnished to the plaintiffs by Craig & Co., whereby it appeared to be signed by all the parties to it. But the plaintiffs were subsequently informed of the refusal of the two to sign it, and thereafter made further advances to the firm of Craig & Co.—Held, that the refusal of two of the members of the firm of Thompson & Co. to sign the agreement of 20th April, 1881, rendered it inoperative, not only as to those refusing to sign it, but also as to those who had signed it, and that until all had signed it was not a complete agreement.—Held, also, that those who actually signed the agreement could not thereby bind their co-partners who did not sign it.—Held, also, that even if the agreement had been completed it did not constitute a partnership between the two firms, so as to enable one firm to pledge the other firm's credit, for advances in carrying on the trade.—Held, also, that the provision for sharing profits and losses, which in an ordinary trading association where there is a community of capital and stock-in-trade, and a common undertaking, is conclusive evidence of a partnership, is nevertheless not a conclusive test of partnership where there is an extraordinary adventure between two partnerships presenting a well defined and well known separation of interests and ownerships.—Held, also, that the way in which the profits are to be participated in is the essence of the matter, and that when the right to call for a proportion of the profits arises by virtue of an express contract to that effect, which would not otherwise flow from the relations of the parties, the right exists qua debt, and not by virtue of partnership.—Held, also, that even assuming that the agreement of 20th April, constituted a partnership between the two firms, yet that the plaintiffs, with knowledge of all the facts, by electing to give credit to Craig & Co. alone, were precluded

from thereafter resorting to Thompson & Co. *The Merchants' Bank v. Thompson—Mallon v. Craig*, 3 O. R., Chy. D. 541.

Where one M. was induced to become a member of a firm, on the faith of representations made to him that the previous losses of the firm only amounted to \$18,000, but it subsequently turned out that such losses amounted to about \$22,000 or \$24,000.—Held, that M. by reason of such misrepresentation was entitled to be relieved from such agreement, and to be indemnified by the other members of the firm against all liabilities incurred by him as such partner, prior to the discovery of the untruth of the representation made as to the losses of the firm. *Id.*

Held, also, that M. having become a partner also on the faith that the firm in question intended to form a syndicate arrangement with another firm, which arrangement failed to be carried out for want of the concurrence of some of the members of such other firm, he was on that account also entitled to be relieved from his agreement to become a partner. *Id.*

III. POWER OF PARTNERS.

The assignment for the benefit of creditors was executed by one partner, at the request of his co-partner, in the partnership name, and was made at the request of several creditors.—Held, that the assignment was properly executed, and that there was sufficient assent of the creditors. *Nolan v. Donnelly et al.*, 4 O. R., C. P. D. 440.

IV. ACTION FOR PARTNERSHIP ACCOUNT.

Where, on the dissolution of a partnership between the plaintiff and defendant, it was agreed that the defendant should wind up the concern, and the plaintiff having demanded a statement of account, the defendant rendered an untrue and imperfect one, whereupon the plaintiff brought this action for a winding-up, claiming that the defendant was indebted to him on account of partnership assets received, which the defendant denied, and the plaintiff succeeded.—Held, that defendant must pay the costs of the suit. *Carmichael v. Sharp*, 1 O. R., Chy. D. 381.

Action for partnership account.—Barred by the statute. See *Cotton v. Mitchell et al.*, 3 O. R. 421, p. 438.

V. DISSOLUTION:

1. Payment of Debts.

See *Re Walker, an Insolvent*, 6 A. R. 169, p. 60. See also *Birkett et al. v. McGuire et al.*, 7 A. R. 53.

VI. DEATH OF PARTNER.

See *Davidson v. Papps*, 28 Chy. 91, p. 58.

VII. ACTIONS AND PROCEEDINGS AGAINST.

In a suit by an infant partner against his co-partner praying for dissolution, receiver, reference, &c., after a decree pro confesso, and during the taking of the accounts under an agreement for the continuance of the partnership business

for that purpose—certain creditors of the firm obtained judgments and executions at law against the partner of the infant who was not informed of these proceedings until the sheriff had seized, and was about to sell, the whole of the partnership property:—Held, on motion for injunction, that the proceedings at law were not within the provisions of R. S. O. c. 123 s. 8, and that the sale should be restrained:—Held, also, that the execution creditors might be made parties for that purpose on motion simply. *Young v. Huber*, 29 Chy. 49.

Blakeslee, Brown & Co. carried on business in partnership, under the name of Blakeslee & Co. Blakeslee absconded on the 19th September, and the business continued. O. assigned his interest to Brown, and after such assignment, but before it had been made public, the plaintiff served his writ of summons against the firm on O.:—Held, that the service was good. *Bank of Hamilton v. Blakeslee et al.*, 9 P. R. 130.—Dalton, Master.

On a reference to take an account of partnership dealings the report found that the plaintiff had contributed to the partnership capital \$87.39, and the defendant \$233.89, and that there was due from the defendant to the plaintiff \$43.74. The taxing officer taxed the plaintiff's costs under the lower scale, on the ground that the case came within C. S. U. C. c. 15, s. 34, sub-s. 1. On appeal, Cameron, J., reversed the taxing officer's ruling. *Blaney v. McGrath*, 9 P. R. 417.

PARTY WALLS.

See BUILDINGS.

PATENT OF INVENTION.

I. COMBINATION AND NOVELTY, 585.

II. ASSIGNMENT AND ROYALTY, 586.

III. INFRINGEMENT.

1. Action for.

(a) *Venue*, 587.

(b) *Other Cases*, 588.

I. COMBINATION AND NOVELTY.

In November, 1879, the plaintiff obtained a patent for a new and useful improvement in bakers' ovens, which was expressed to be "In combination with a bakers' oven, a furnace, 'D,' set within the oven but below the sole, 'A.'" This patent he surrendered, and a new one issued in August, 1880, on the ground that the first was inoperative by reason of the insufficiency of the description. The new patent was for the unexpired portion of the five years covered by the first patent. The claim of invention, as set forth in the specification, was: "(1) In a fire-pot or furnace placed within a baker's oven below the sole thereof, and provided with a door situated above the grate. (2) In a fire-pot or furnace placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected with the said furnace by an inclined

guide. (3) In a flue, 'H,' leading from below the grate, 'B,' to the flue, 'E,' (4) In a baker's oven provided with a circular tilting grate situated below the sole of the oven, and provided with a door. (5) In a cinder grate, 'F,' placed beneath the fire-grate, 'B,' in combination with a flue, 'H.'" The plaintiff, in his specifications, claimed all these as his inventions; in his evidence he claimed each of the combinations to be the subject of the patent:—Held (1), if the plaintiff was correct in the latter view, that the last four combinations being new, the first patent could not have been inoperative as to them; and the second patent in respect of these must be construed as an independent one, issuing for the first time on its date, and as all other than the first combination had been used for upwards of a year prior to the patent, he was not entitled to a patent therefor; (2) that the 5th combination of previously known articles, as applied to a baker's oven, which was productive of results which were new and useful to the trade, was a subject of a patent. *Hunter v. Carrick*, 23 Chy. 489.

Some of the devices were in use before the patent, but numerous witnesses engaged in baking testified that they never knew of the combination before the plaintiff's invention:—Held, that the defence for want of novelty failed. *Ib.*

Held, also, that the first combination in the patent of 1880 was such an amendment as is contemplated by the Act, 35 Vict. c. 26, s. 19. *Ib.*

The defendant's oven was completed early in July, 1880, and before the re-issue of the plaintiff's patent; she had in use the first and fourth combinations, and continued to use them after such re-issue:—Held, that there was no any remedy for the intermediate user, as the patent was then inoperative; but as to any subsequent infringement, the user under a defective patent could not operate as a defence. *Ib.*

The plaintiff claimed as his invention, for the purpose of purifying flour during its manufacture, a bolting cloth or sieve, through which a current of air was forced upwards by means of an air chamber and a fan, or substitute therefor, and, in order to keep such sieve from becoming clogged, a brush, or a number of brushes, arranged in such a manner as to traverse the under service. The air chamber and the fan combined with the bolt or sieve were admittedly old: and it appeared that one B. had patented a machine which was in use in the manufacture of semolina, in which a similar brush arrangement was in use for the purpose of keeping open the meshes of the sieve when used:—Held (affirming the judgment of Spragge, C.), that the plaintiff's invention was not patentable. Quære, as to the effect under 35 Vict. c. 26, s. 28, D. of a decision of the minister of agriculture. *Smith v. Goldie et al.*, 7 A. R. 628. Affirmed in the Supreme Court. Special leave to appeal to Her Majesty in Council in this case was refused.

See *Owens v. Taylor*, 29 Chy. 210, p. 587.

II. ASSIGNMENT AND ROYALTY.

The mere attaching of the support of the handle of a pump higher or lower in position than that formerly in use, is not the subject of a

patent; but P. having obtained a patent therefor, which he assigned to the plaintiff, who again assigned, to the defendant subject to certain royalties:—Held, that notwithstanding the invalidity of the patent he was entitled to recover the amounts payable to him under the agreement during the currency thereof. *Owens v. Taylor*, 29 Chy. 210.

Where G. granted the exclusive right to manufacture a certain patented article to W., and covenanted that R., the original patentee of whom W. was assignee, would "warrant and defend" W. in the possession of the patent right, and that if R., neglected or refused to "protect and defend" W. in his peaceable possession of the said patent right, then the royalty to be paid by W., as the consideration for the said grant, should cease:—Held, G. was liable under this covenant only if R. neglected to defend W. as against all persons having any right to manufacture or sell the patented article, not as against mere wrong doers:—Semble, if there had been breach of the covenant by G., the defendant would not have been liable to pay the royalty under the above agreement, though he had continued to manufacture the patented article. *Green et al. v. Watson*, 2 O. R., Chy. D. 627. Affirmed in appeal. See 20 C. L. J. 285.

The plaintiff, the owner of a patent for an improved pump which had only about a month to run, but was renewable for two further terms of five years each, sold the same; together with certain freehold and chattel property, to the defendants for \$4,500, of which \$1,500 was paid down, and a mortgage given on the property for the residue:—Held, (reversing the decree of the court below, *Patterson, J. A.*, dissenting), that under the circumstances appearing herein and in the court below, (26 Chy. 322) all that the purchasers could claim was the right under the patent for the remainder of the first term of five years. Per *Patterson, J. A.* Under the agreement and assignment set out in his judgment, the defendants were entitled to the extension as well as to the current term. *Powell v. Peck*, 8 A.R. 498.

III. INFRINGEMENT.

1. Action for.

(a) Venue.

In an action for the infringement of a patent, plaintiff laid the venue in Hamilton, while the defendant was a resident of Toronto:—Held, that regarding the language of sec. 24 of the Patent Act 1872, the venue should be laid in the county where the defendant resided; and an order was made under Rule 254, to change the place of trial to Toronto. *Goldsmith v. Walton*, 9 P. R. 10.—Osler.

Held, that the word "may" in 35 Vict. c. 26, s. 24, D., was obligatory and not merely permissive, and that the venue in an action to restrain the infringement of a patent, must be laid at the place of sittings of the court in which the action is brought, nearest to the place of residence or business of the defendant:—Held, also that sec. 24 was not ultra vires of the Dominion parliament. *Aitcheson v. Mann*, 9 P.R., Q.B.D. 473, 253.

(b) Other Cases.

An action for the infringement of a patent should not ordinarily be tried by a jury. *Vermyleya v. Guthrie*, 9 P. R. 267.—Boyd.

In an action to restrain the infringement of a patent, in which the defence set up that the supposed invention had been previously patented in the United States and England, copies of American patents material to the defendant's case were procured by his solicitors of their own motion for the purposes of the action:—Held, that such documents were privileged from production. *The Guelph C. Co. v. Whitehead*, 9 P. R. 509.—Dalton, Master.

PAWNBROKER.

Remarks upon the law relating to pawnbrokers. *Regina v. Adams*, 8 P. R. 462.—Cameron.

A pawnbroker under C.S.C., c. 61, may legally charge any rate of interest that may be agreed upon between him and the pledger. *Id.*

PAYMENT.

I. TO CREDITORS.

1. *Time of Payment*, 588.
2. *Appropriation of Payments*, 588.
3. *By Cheque*, 589.
4. *Of Bills or Notes*—See *BILLS OF EXCHANGE AND PROMISSORY NOTES*.
5. *Of Mortgages*—See *MORTGAGE*.
6. *To Save the Statute*—See *LIMITATION OF ACTIONS AND SUITS*.

II. PAYMENT OF MONEY INTO COURT.

1. *In Suits*, 589.
2. *Other Cases*, 589.
3. *On Sale of Land by Order of the Court*—See *SALE OF LAND BY ORDER OF THE COURT*.

III. PAYMENT OF MONEY OUT OF COURT.

1. *Generally*, 589.
2. *Paid in as Security for Costs pending Appeal*—See *COSTS*.

I. TO CREDITORS.

1. Time of Payment.

Where money is lent to be repaid when the borrower is able, his ability may be shewn by a slight amount of evidence such as is open to public observation of a flourishing condition of his affairs, and it is not necessary to shew that the borrower is in a position to discharge the debt without inconvenience. *Re Ross*, 29 Chy. 385.

2. Appropriation of Payments.

See *Birkett et al v. McGuire et al*, 31 C. P. 430; reversed by 7 A. R. 53.

3. By Cheque.

A cheque of the plaintiff's when produced at the hearing, had written on it, "in full of all his (the defendant's) claims for notes or otherwise," and which words the plaintiff swore were on the cheque when sent to the defendant, which he denied, however. Four crosses were on the face of the cheque, and some initial letters in the margin, and these the plaintiff stated were the initials of the clerk in the bank, whom he had requested to initial the words so introduced: The Court (Spragge, C.), refused to receive this as evidence of a receipt in full, in the absence of the bank clerk, who should have been called as a witness. *Livingstone v. Wood*, 27 Chy. 515.

Of Premium on life policy. See *Neill v. The Union Mutual Life Ins. Co.*, 7 A. R. 171, p. 378.

II. PAYMENT OF MONEY INTO COURT.

1. In Suits.

Where there were cross-actions, in one of which a sum had been reported due and a claim of set-off had been disallowed, in a subsequent action brought to recover the sum disallowed, the plaintiff was held entitled to move for judgment under Rule 324. But the affidavits filed on the motion being conflicting:—Held, the action must be entered for trial at the sittings for the examination of witnesses, but the amount found due in the first action was ordered to be paid into Court, to abide the result of the second action. *Francis v. Francis*, 9 P. R. 209.—Proudfoot.

Where the plaintiff in an alimony suit obtains a writ of arrest and the defendant gives bail and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked, paid into Court, to be applied from time to time in payment of the alimony and costs. *Needham v. Needham*, 29 Chy. 117.

2. Other Cases.

The Referee in Chambers has no jurisdiction to make an order for payment into Court by an executor or administrator of amounts admitted by him to be in his hands. *Re Curry, Wright v. Curry*; *Currie v. Currie*, 8 P. R. 340.—Holmested, *Referee*.

Interest on money deposited in Court. See *Wilkins v. Geddes*, 3 S. C. R. 203, p. 336.

III. PAYMENT OF MONEY OUT OF COURT.

1. Generally.

Right to recover back money paid out of court on judge's order pending appeal. See *Citizens' Ins. Co. v. Parsons et al.*, 32 C. P. 492, p. 175.

Where money is paid into court under an order giving leave to "apply at Chambers" for its payment the referee has jurisdiction to make the order for payment out. *In re Selby*, 8 P. R. 342.—Holmested, *Referee*.

Where a party is entitled to an assignment of a bond, and to realize it for his own benefit, his rights are the same in regard to money deposited;

and where in an alimony suit the statutory bond under a writ of ne exeat has been given, the plaintiff is entitled to have the moneys deposited as collateral security therefor, paid into court, and applied in discharging arrears of alimony. *Richardson v. Richardson*, 8 P. R. 274.—Proudfoot—Spragge.

About \$40,000 was paid into court during the progress of the suit. The decree dismissed the bill, and ordered payment of the money in court to defendant. The plaintiff appealed, and paid \$430 into court as security for costs. Subsequently an order was made by the referee staying payment out to the defendant, pending the appeal, upon the plaintiff giving additional security to the amount of \$200 for the difference between the legal interest and that allowed by the court:—Held, on appeal that such order was not ultra vires nor unreasonable. *McDonald v. Worthington*, 8 P. B. 554.—Ferguson.

The plaintiffs having moved for an injunction to restrain the sale of goods under execution, the motion was enlarged and the sale permitted to proceed, the money arising therefrom being directed to be paid into court to the credit of the cause, there to abide the further order of the court. The injunction was afterwards refused:—Held, on appeal from the referee, ordering payment out, that the payment out of the fund was discretionary with the court, and that pending the appeal to the Court of Appeal the same should remain in court, but might be paid out on proper security being given. Held, also, no objection that the order refusing the injunction, and the order for payment out had not been entered. *King v. Duncan*, 9 P. R. 61.—Ferguson.

An order was made in this matter by the referee in chambers before the passing of the O. J. Act directing certain ascertained shares then in court to be paid out to certain infants as they respectively came of age:—Held, that the shares might be paid out without any further order, notwithstanding Rule 424, O. J. Act. *Re Cameron, Infants*, 9 P. R. 77.—Proudfoot.

Where money has been paid into court for a specific purpose, and that purpose has been answered in favour of the party paying it in it will be paid out to that party. *McLaren v. Caldwell*, 9 P. R. 118.—Proudfoot.

As to jurisdiction of master in Chambers. See *Re Devitt*, 9 P. R. 110.

Payment into bank to credit of wrong cause. See *Johnston v. Johnston*, 9 P. R. 259, p. 472.

PENAL ACTIONS AND PENALTIES.

AGAINST MAGISTRATES—See JUSTICES OF THE PEACE.

An order for security for costs cannot be obtained in an action for penalties under R. S. O. c. 50, s. 71, upon the affidavit made by the defendant's attorney. That section of the C. L. P. Act requires the affidavit to be made by the defendant personally. An application made upon the affidavit of the solicitor of the defendants, a corporation, was refused. *Martin qui tam v. The Consolidated Bank*, 45 Q. B. 163.

Action to recover penalty from a deputy returning officer under 37 Vict. c. 9, s. 103. Dom. See *Cameron v. Lucas*, 9 P. R. 405, p. 527.

In penal statutes questions of doubt are to be construed favourably to the accused, and where the court of first instance in a quasi criminal trial has acquitted the respondent, the appellate court will not reverse his finding. *North Ontario Election (Ont.)—McCaskill v. Paxton*, 1 H. E. C. 304.

PENALTY BY CONTRACT.

The defendant, who had trespassed on the plaintiff's land by placing stones and commencing to build a stone fence thereon, entered into an agreement to remove the same before the 15th of December, unless, upon a re-survey, which he had the privilege of having made before the 15th November, it was found that the line run by one S., a surveyor, was not the correct line, or unless defendant should fail to have such re-survey; and he agreed "to pay to the plaintiff the sum of \$200 as liquidated damages if the said stones and stone fence are not removed, as hereinbefore agreed, at the times mentioned in this agreement":—Held, affirming the judgment of the County Court, that the sum mentioned was not a penalty, but liquidated damages for the omission to perform a specific act, viz., the removal of the stones and stone fence. *Craig v. Dillon*, 6 A. R. 116.

See *The Corporation of the Village of Bruslées v. Ronald et al.*, 4 O. R. 1, p. 487.

PERPETUITY.

See WILL.

PETITION.

See MUNICIPAL CORPORATIONS—PARLIAMENTARY ELECTIONS—QUIETING TITLES.

PETITION OF RIGHT.

I. IN CASES OF CONTRACT, 591.

II. IN OTHER CASES, 596.

III. PLEADING, 599.

IV. COSTS, 600.

I. IN CASES OF CONTRACT.

The suppliant engaged by contract under seal, dated 4th December, 1872, with the minister of public works, to construct, finish and complete, for a lump sum of \$78,000, a deep sea wharf at Richmond station at Halifax, N. S., agreeably to the plans in the engineer's office and specifications, and with such directions as should be given by the engineer in charge during the progress of the work. By the 7th clause of the contract no extra work could be performed, unless "ordered in writing by the engineer in charge

before the execution of the work." By letter, dated 26th August, 1873, the minister of public works authorized the suppliant to make an addition to the wharf by the erection of a superstructure to be used as a coal floor, for the additional sum of \$18,400. Further extra work which amounted to \$2,781, was performed under another letter from the public works department. The work was completed and on the final certificate of the government engineer in charge of the works, the sum of \$9,681, as the balance due, was paid to the suppliant, who gave the following receipt, dated 30th April, 1875: "Received from the Intercolonial railway, in full, for all amounts against the government for works under contract, as follows: 'Richmond deep water wharf works for storage of coals, work for bracing wharf, rebuilding two stone cribs, the sum of \$9,681.' " The suppliant sued for extra work, which he alleged was not covered by the payment made on the 30th April, 1875, and also for damages caused to him by deficiency in and irregularity of payments. The petition was dismissed with costs; and a rule nisi for a new trial was subsequently moved for and discharged:—Held, affirming the judgment of the court below, that all the work performed by the suppliant for the government was either contract work within the plans or specifications, or extra work within the meaning of the 7th clause of the contract, and that he was paid in full the contract price, and also the price of all extra work for which he could produce written authority, and that the written authority of the engineer and the estimate of the value of the work were conditions precedent to the right of the suppliant to recover payment for any other extra work. (Henry, J., dissenting.) *O'Brien v. The Queen*, 4 S. C. R. 529.

Per Ritchie, C.J., that neither the engineer, nor the clerk of the works nor any subordinate officer in charge of any of the works of the Dominion of Canada, have any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specially authorized by the express terms of contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract. *Ib.*

On the 25th May, 1870, J. and S., contractors' entered into a contract with the Intercolonial Railway Commissioners (authorized by 31 Vict., c. 13) to construct and complete section No. 7 of the said Intercolonial Railway for the Dominion of Canada, for a bulk sum of \$557,750. During the progress of the work, changes of various kinds were made. The works were sufficiently completed to admit of rails being laid, and the line opened for traffic on the 11th Nov., 1872. The total amount paid on the 10th Feb., 1873, was \$557,750, the amount of the contract. The contractors thereupon presented a claim to the commissioners amounting to \$116,463.83 for extra work, &c., beyond what was included in their contract. The commissioners, after obtaining a report from the chief engineer, recommended that an additional sum of \$31,091.85 (less a sum of \$8,300 for timber bridging not executed, and \$10,354.24 for under drain taken off contractor's hands) be paid to the contractors upon receiving a full discharge of all claims of every kind or

description under the contract. The balance was tendered to suppliants and refused. The contractors thereupon, by petition of right, claimed \$124,663.33, as due from the Crown to them for extra work done by them outside of and beyond the written contract, alleging that by orders of the chief engineer additional work and alterations were required, but these orders were carried out only on the understanding that such additional work and alterations should be paid for extra; and alleging, further, that they were put to large expens: and compelled to do much extra work which they were entitled to be paid for, in consequence of misrepresentations in plans and bill of works exhibited at the time of letting. On the profile plan it was stated that the best information in possession of the chief engineer respecting the probable quantities of the several kinds of work would be found in the schedules accompanying the plan "but contractors must understand that these quantities are not guaranteed;" and in the bill of works, which purported to be an abstract of all information in possession of the commissioners and chief engineer with regard to the quantities, it was stated, "the quantities herein given as ascertained from the best data obtained are, as far as known, approximately accurate, but at the same time they are not warranted as accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate." The contract provided *inter alia*, that it should be distinctly understood, intended and agreed that the said price or consideration of \$557,750 should be the price of, and be held to be full compensation for all the works embraced in, or contemplated by the said contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not upon any pretext whatever, be entitled by reason of any change, alteration or addition, made in or to such works, or in the said plans and specifications, or by reason of the exercise of any of the powers vested in the Governor-in-council by the said Act, intituled "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineer, by the said contract or by law, to claim or demand any further or additional sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and any such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the said contract, relating to alterations in the grade or line of location, and that the said contract and the said specifications should be in all respects subject to the provisions of the Act first cited in the said contract, intituled "An Act respecting the construction of the Intercolonial Railway," 31 Vict. c. 13, and also, in as far as they might be applicable, to the provisions of "The Railway Act of 1868." The 18th section of 31 Vict. c. 13, enacts "that no money shall be paid to any contractor until the chief engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved of by the commissioners. No certificate was given by the chief engineer of the execution of the work:—Held, that the contract requiring that any work done on the road must be certified to by the chief engineer, until he so certified and such certificate was approved of by the commissioners, the contractors were not entitled to

be paid anything. That if the work in question was extra work, the contractors had by the contract waived all claim for payment for any such work. If such extra work was of a character so peculiar and unexpected as to be considered *dehors* the contract, then there was no such contract with the commissioners as would give the contractors any legal claim against the Crown; the commissioners alone being able to bind the Crown, and they only as authorized by statute. That there was no guarantee, express or implied, as to the quantities, nor any misrepresentations respecting them. But even if there had been, a petition of right will not lie against the Crown for tort, or for a claim based on an alleged fraud, imputing to the Crown the fraudulent misconduct of its servants. *Jones et al. v. The Queen*, 7 S. C. R. 570.

In the contract it was also provided that if the contractors failed to perform the works within the time agreed upon in and by the said contract, to wit, 1st July, 1871, the contractors should forfeit all money then due and owing to them under the terms of the contract, and also the further sum of \$2,000 per week for all the time during which said works remained incomplete after the said 1st July, 1871, by way of liquidated damages for such default. The contract was not completed till the end of August, 1872:—Held, that if the Crown insisted on requiring a decree for the penalties, time being declared the essence of the contract, the damages attached, and the Crown was entitled to a sum of \$2,000 per week from the 1st July, 1871, till the end of August, 1872, for liquidated damages. The Crown subsequently waiving the forfeiture, judgment was rendered in favour of the suppliants for the sum of \$124,663.11, being the amount tendered by the respondent, less the costs of the Crown in the case to be taxed and deducted from the said amount. *Ib.*

In January, 1872, the Commissioners of the Intercolonial Railway gave public notice that they were prepared to receive tenders for the erection *inter alia* of certain engine houses according to plans and specifications deposited at the office of the chief engineer at Ottawa. J. I. tendered for the erection of an engine house at Metapedia, and in October following he was instructed by the commissioners to proceed in the execution of the work, according to his accepted tender, the price being \$21,939. The work was completed and delivered to the Government in October, 1881. The specifications provided as follows: "The commissioners will provide and lay railway iron, and will also provide and fix cast-iron columns, iron girders, and other iron work required for supporting roof." In September, 1873, J. I. was unable to proceed further with the execution of his work, in consequence of the neglect of the commissioners to supply the iron girders, &c., until March following, owing to which delay he suffered loss and damage. During the execution of the work, J. I. was instructed and directed by the commissioners or their engineers to perform, and did perform, certain extra works not included in his accepted tender, and not according to the plans, drawings and specifications. By his petition of right, J. I. claimed \$3,795.75 damages in consequence of the delay on the part of the commissioners to provide the cast-iron columns, &c., and \$3,505.10 for extra works. The Crown demurred and also traversed the allegation of

negligence and delay, and admitted extra work to the amount of \$5,056.60, and set up the 18th sect. of 31 Vict. c. 13, which required the certificate of the engineer-in-chief as a condition precedent to the payment of any sum of money for work done on the Intercolonial railway. By 37 Vict. c. 15, on the 1st June, 1874, the Intercolonial railway was declared to be a public work vested in Her Majesty and under the control and management of the Minister of Public Works, and all the powers and duties of the commissioners were transferred to the Minister of Public Works, and sec. 3 of 31 Vict. c. 13, was repealed, with so much of any other part of the said Act as might be in any way inconsistent with 37 Vict. c. 15.—Held, that the tender and its acceptance by the commissioners constituted a valid contract between the Crown and J. I., and that the delay and neglect on the part of the commissioners acting for the Crown to provide and fix the cast-iron columns, &c., which were, by the specifications, to be provided and fixed by them, was a breach of the said contract, and that the Crown was liable for the damages resulting from such breach. That the extra work claimed for, being for a sum less than \$10,000, the commissioners had power to order the same under the statute 31 Vict. c. 13, s. 16, and J. I. could recover by petition of right, for such part of the extra work claimed as he had been directed to perform. That the 18th sec. of 31 Vict. c. 13, not having been embodied in the agreement with J. I. as a condition precedent to the payment of any sum for work executed, the Crown could not now rely on that section of the statute for work done and accepted and received by the Government. That the effect of 37 Vict. c. 15, was to abolish the office of chief engineer of the Intercolonial railway, and for work performed and received on or after 1st June, 1874, to dispense with the necessity of obtaining, as a condition precedent to the payment for the same, the certificate of said engineer-in-chief, in accordance with sec. 18 of 31 Vict. c. 13. *Isbester v. The Queen*, 7 S. C. R. 696.

By his petition of right, W., a sculptor, alleged that he was employed by the Dominion government to prepare plans, models, specifications and designs, for the laying out, improvement and establishment of the parliament square, at the city of Ottawa: that he had done so, and superintended the work and construction of said improvements for six months. He claimed \$50,000 for the value of his work. 31 Vict. c. 12, s. 7, provides that, when executory contracts are in writing they shall have certain requisites, such as signing, sealing and countersigning to be binding; and by sec. 15 provides that before any expenditure is incurred there shall have been a previous sanction of parliament, except for such repairs and alterations as the public service demands; and by sec. 20, requires that tenders shall be invited for all works, except in cases of pressing emergency, or where from the nature of the work it could be more expeditiously and economically executed by the officers and servants of the department.—Held, 1. that the Crown in the Dominion cannot be held responsible under a petition of right on an executory contract entered into by the department of public works for the performance of certain works placed by law under the control of the department, when the agreement therefor was not

made in conformity with the above 7th sec. of 31 Vict. c. 12. 2. That under sec. 15 of said Act, if parliament has not sanctioned the expenditure, a petition of right will not lie for work done for and at the request of the department of public works, unless it be for work done in connection with repairs and alterations which the necessities of the public service demanded. 3. That in this case, if parliament has made appropriations for these works and so sanctioned the expenditure, and if the work done was of the kind that might properly be executed by the officers and servants of the department under sec. 20 of said Act, then no written contract would be necessary to bind the department, and suppliant should recover for work so done. *Wood v. The Queen*, 7 S. C. R. 634.

II. IN OTHER CASES.

In order to establish a right to damages against the Crown for having, as alleged, obstructed the flow of water to the mills of the suppliants, it is incumbent on the suppliants to shew that less than the natural volume of water forming the stream reaches their mill on account of such alleged obstruction: therefore, where it appeared upon the evidence that certain waters alleged to have been penned back by a dam would never have reached the mills of the suppliants, and the extreme and unprecedented dryness of the season had had an appreciable effect upon the supply of water:—Held, that the evidence did not sustain the petition, which alleged that the suppliants sustained damage by the erection of a dam across the river, above their mill. *The Muskoka Mill Co. v. The Queen*, 28 Chy. 563.

The maxim that the Crown can do no wrong, applies to alleged tortious acts of the officers of a public department of Ontario, and a petition of right will not lie for such alleged wrongful acts under 35 Vict. c. 13, O., which creates no new right in the subject against the Crown, but relates rather to procedure only. The redress of a subject suffering damage from such acts, if unauthorized by statute, would be against the subject who committed the wrong, and not against the Crown. *Id.*

Action against the Crown for counsel fees.—Retainer. See *The Queen v. Doutre*, 6 S.C.R. 342, p. 161. Affirmed by Her Majesty in council.

Held that a petition of right does not lie to recover compensation from the Crown for damage occasioned by the negligence of its servants to the property of an individual using a public work. *The Queen v. McFarlane et al.*, 7 S. C. R. 216.

Held, that an express or implied contract is not created with the Crown because an individual pays tolls imposed by statute for the use of a public work, such as slide dues for passing his logs through government slides. In such a case Her Majesty cannot be held liable as a common carrier. *Id.*

N. C., the suppliant, by his petition of right, claimed, as representing the heirs of P. W. Jr., certain parcels of land originally granted by letters patent from the crown, dated 5th January, 1806, to P. W. Sr., together with a sum of \$200,—

000 for the rents, issues and profits derived therefrom by the government since the illegal detention thereof. As to the merits defendant pleaded:—1st. By preemptory exception, setting up title and possession in Her Majesty under diverse deeds of sale and documents; 2nd. Prescription by 30, 20 and 10 years. An exception was also filed, setting up that these transfers to petitioner by the heirs of P. W. Jr. were made without valid consideration, and that the rights alleged to have been acquired were disputable, (*droits litigieux*.) The general issue and a supplementary plea claiming value of improvements were also filed. To the first of these exceptions the petitioner answered that the parties to the deeds of sale relied upon had no right of property in the land sold, and denied the legality and validity of the other documents relied upon, and inscribed en faux against a judgment of ratification of title to a part of the property rendered by the superior court for the district of Aylmer, P. Q. To the exception of prescription the petitioner answered, denying the allegations thereof, and more particularly the good faith of the defendant. To the supplementary plea, the petitioner alleged bad faith on the part of the defendant. There were also general answers to all the pleas. On the issues thus raised, the parties went to proof by an enquête had before a commissioner under authority of the court, granted on motion, in accordance with the law of the province of Quebec. The case was argued in the Exchequer Court before J. T. Taschereau, J., and he dismissed the suppliant's petition of right with costs. Whereupon the suppliant appealed to the Supreme Court of Canada:—Held (Fournier and Henry, JJ., dissenting) 1. That before the code, and also under the code (Art. 2211) the Crown had, under the laws in force in the province of Quebec, the right to invoke prescription against a subject, which the latter could have interrupted by petition of right. 2. That in this case the Crown had purchased in good faith with translatory titles, and had, by ten years peaceable, open and uninterrupted possession, acquired an unimpeachable title. 3. That in relation to the inscription en faux, the Art. 473 of the Code of Procedure is not so imperative as to render the judgment attacked an absolute nullity, it being registered in the register of the court. 4. That the petitioner was bound to have produced the minute, or draft of judgment attacked, but having only produced a certified copy of the judgment, the inscription against the judgment fell to the ground. 5. That even if S. O.'s title was un titre précaire, the heirs by their own acts ceded and abandoned to L. all their rights and pretensions to the land in dispute, and that the petitioner C. was bound by their acts:—Held, also, that the compensations claimed by the incidental demande of the Crown were payable by the petitioner, even if he had succeeded in his action. *Chevrier v. The Queen*, 4 S. C. R. 1.

Under the provisions of 8 Geo. IV., c. 1, passed on the 17th Feb., 1827, by the Provincial Parliament of Upper Canada, and generally known as the Rideau Canal Act, Lt.-Colonel By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one Grace McQueen, as necessary for making and completing said canal, but only some 20 acres were actually necessary and used for canal purposes. Grace Mc-

Queen died intestate, leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death, on the 31st January, 1832, Alexander McQueen released to William McQueen all his interest in the said lands, and on the 6th February, 1832, William McQueen granted to Colonel By all the lands previously granted to his mother. Colonel By died on the 1st February, 1836. By 6 Will. IV., c. 16, persons who acquired title to lands used for the purposes of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation. By the Ordnance Vesting Act, 7 Vict., c. 11, Can., the Rideau canal and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by sec. 29 it was enacted: "Provided always, and be it enacted, that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken." By the 9th Vict., c. 42, Can., it was recited that the foregoing proviso had given rise to doubt as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks, under 8 Geo. IV., c. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to Sparks for the land retained for canal purposes, and for the re-investing in him and his grantees of the portions of lands taken but not required for such purposes. By the 19th and 20th Vict., c. 45, the Ordnance properties became vested in Her Majesty for the uses of the late Province of Canada, and by the British North America Act they became vested in Her Majesty for the use of the Dominion of Canada. The suppliants, the legal representatives of Colonel By, brought a petition of right, alleging the foregoing facts, and seeking to have Her Majesty declared a trustee for them of all the said lands not actually used for the purposes of the said canal, and praying that such portion of said lands might be restored to them, and the rents and profits thereof paid, and as to any parts sold that the values thereof might be paid together with the rents and profits, prior to the selling thereof. By his statement in defence, the Attorney-General contended, among other things, that (par. 5) no interest in the lands set out and ascertained by Colonel By passed to William McQueen, but the claim for compensation or damages for taking said lands was personal estate of Grace McQueen, and passed to her personal representative; that (par. 6, 7 and 8,) the deeds of the 31st January and 6th February, 1832, passed no estate or interest, the title and possession of the lands, being in His Majesty, but that such deeds were void under 32 Hen. VIII., c. 9; that (par. 9) Colonel By was incapable, by reason of his position, of acquiring any beneficial interest in said lands as against His Majesty; that (par. 10, 11, 12 and 13,) Colonel By took proceedings under 8 Geo. IV., c. 1, to obtain compensation for the lands in question, but the arbitrators and also a jury summoned under the Act decided that he was entitled to no compensation by reason of the enhancement of the value of his other land and of other advantages accrued by the building of the canal, and that his award and verdict were a-

bar to the suppliants claim; that (par. 14 and 15,) the proviso of 9 Vict., c. 42, was confined to Nicholas Sparks and did not extend to the lands in question; that (par. 16, 17, 18 and 19,) by virtue of 2 Vict., c. 19 (Upper Canada) and a proclamation issued in pursuance thereof, all claims for damages which might have been brought under 8 Geo. IV., c. 1, by owners of lands taken from the canal, including claims of the said Grace McQueen or Colonel By, or their respective representatives, were, on and after the 1st April, 1841, for ever barred; that (par. 26, 27 and 28,) the suppliants were barred by their own laches; and that (par. 27) they were barred by the statute of limitations. On a special case stated on the pleadings for the opinion of the court:—Held, 1. The statute of limitations was properly pleadable under sec. 7 of the Petition of Right Act of 1876. 2. William McQueen took the lands by descent from his mother, if she died before the lands were set out and ascertained for the purposes of the canal. If she died afterwards, he did not, as they were vested in the Crown under 8 Geo. IV., c. 1, ss. 1, 3, and her right was converted into a claim for compensation under the 4th section. 3. This right of compensation or damages, if asserted under the 4th sec. of 8 Geo. IV., c. 1, would go to Grace McQueen's personal representatives, but if the land was obtained by surrender under the 2nd sec. of the statute, then the heir-at-law of Grace McQueen would be the person entitled to receive the damages and execute the surrender. 4. The deeds of the 31st January, 1832, and 6th February, 1832, are void as against the Crown so far as they relate to the acres in dispute, except so far as the same may be considered as a surrender to the Crown under the 2nd sec. of the Rideau Canal Act. 5. The 9th paragraph of the statement in defence is a sufficient answer in law to the petition. 6. The defence set up in the 10th, 11th, 12th and 13th paragraphs of the statement would be sufficient in law, supposing the statements therein to be true. 7. The proviso of 9 Vict., c. 42, s. 29, was confined in effect to the lands of Nicholas Sparks only. 8. If the claim is to be made by Grace McQueen's personal representatives under the 4th section of the Rideau Canal Act (and any claim by her could only be under that section) the Acts referred to in the 16th, 17th, 18th and 19th paragraphs of the statement in defence have an application to this case and would constitute a bar against all claims to be made under the Rideau Canal Act. As to the claims to be made by the heirs of Colonel By, they have no claims under any of the statutes. 9. If the Ordinance Vesting Act vested the 110 acres in question in the heirs of Colonel By, the court was not prepared to say that their claim had been barred by laches on the statement set out in the petition. But the statute had not that effect, nor had Colonel By or his legal representatives ever had for his or their own use and benefit any title to these 110 acres. *Tyler et al. v. The Queen*, 7 S. C. R. 651.

See *Jones v. The Queen*, 7 S. C. R. 570, p. 594.

III. PLEADING.

N. C., the suppliant, by his petition of right claimed, as representing the heir of P. W., jr., cer-

tain parcels of land originally granted by letters patent from the crown, dated 5th January, 1806, to P. W., senr., together with a sum of \$200,000 for the rents, issues and profits derived therefrom by the government since the illegal detention thereof. The crown pleaded to this petition of right—1st, by demurrer, defense an fonds en droit, alleging that the description of the limits and position of the property claimed was insufficient in law: 2nd, that the conclusions of the petition were insufficient and vague: 3rd, that in so far as respects the rents, issues and profits, there had been no signification to the government of the gifts or transfers made by the heirs to the suppliants. These demurrers were dismissed by Strong, J., and it was—Held, that the objection taken should have been pleaded by exception a la forme, pursuant to Art. 116 C. C. P., and as the demurrer was to all the rents, issues and profits as well those before as those since the transfer, it was too large and should be dismissed, even supposing notification of the transfer necessary with respect to rents, issues and profits accrued previous to the sale to him by the heirs of P. W., jr. *Chevrier v. The Queen*, 4 S. C. R. 1.

IV. COSTS.

In dealing with the question of costs upon a petition of right, the same rule will be applied as if the question was one between subject and subject; therefore, where on a petition of right the Crown instead of demurring, went to a hearing, the court (Spragge, C.) on dismissing the petition, allowed to the Crown such costs only as would have been taxed had the liability of the Crown been raised by demurrer. *The Muskoka Mill Co. v. The Queen*, 28 Chy. 563.

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(*Since the Judicature Act, 1881.*)

I. VENUE.

Where the cause of action arose, and the defendant resided at Pembroke, and the writ in the action was issued at Pembroke, but the plaintiff advisedly proposed to have the action tried at Kingston, alleging that he could not obtain a fair trial from a jury at Pembroke, owing to the influence of the defendant in that county:—Held, on appeal, reversing the action of the local judge at Pembroke, that the defendant should not succeed in having the place of trial changed from Kingston to Pembroke, as upon the affidavits filed he did not shew such a preponderance of convenience in favour of Pembroke, as to warrant depriving plaintiff of his right to choose the venue. *Davis v. Murray*, 9 P. R. 22.—Cameron.

A formal verdict was entered at the Ottawa Assizes, subject to a reference, which failed through the omission of the arbitrators to enlarge the time. A judge in single court set aside the verdict, and granted a new trial. The plaintiffs resided in Montreal, and defendant's officers at Picton, and plaintiffs had some witnesses resident in Toronto. It appeared that Toronto was as easily accessible as Ottawa, and that no inconvenience would be occasioned by a change of

venue to Toronto. Under these circumstances the change was directed. *Cooper et al. v. The Central Ontario R. W. Co.*, 4 O. R., C. P. D. 280.

An order was made by the Master in Chambers changing the venue from the Assizes at Simcoe, for which notice had been given, to the Chancery Sittings at London. The judge presiding at those sittings having refused to take the case, as it belonged to a Common Law Division:—Held, without determining whether the master's order was a proper one, that the plaintiff was justified in acting on it, and his costs occasioned by the abortive attempt at trial, were allowed to him. *Schwob v. McGloughlin*, 9 P. R. 475.—Cameron.

In actions for infringement of patent. See *Goldsmith v. Walton*, 9 P. R. 10, p. 587; *Aitchison v. Mann*, 9 P. R. 253, 473, p. 587.

II. PARTIES.

1. Husband and Wife.

The inchoate right of dower at law obtained by a wife in land conveyed to her husband makes her a proper party defendant to a suit to set aside a conveyance made to her husband by fraud in which the wife is alleged to have assisted. *McFarland v. McFarland*, 9 P. R. 73.—Boyd.

2. Other Persons.

Held, (affirming *Ferguson, J.*) that inasmuch as, if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered, they would be trustees of the proceeds for her, the plaintiff might maintain the suit in her own name. *Roberts v. Hall*, 1 O. R., Chy. D. 388.

The plaintiff shipped goods from St. Johns, Quebec, to Dundas, Ontario, to be carried from St. Johns to Toronto by the Grand Trunk Ry. Co., who delivered them to the Great Western Ry. Co., who carried the same to Dundas, where the goods arrived in a damaged state. The plaintiff being in doubt as to which company was liable, there having been a separate contract with each, joined both as defendants:—Held, affirming the order of Proudfoot, J., who had affirmed the order of the master in Chambers, (9 P. R. 80,) that the case came within Rule 94 of the Judicature Act, and that the plaintiff had a right to make both companies parties. *Harvey v. The Grand Trunk R. W. Co., and Great Western R. W. Co.*, 7 A. R. 715.

Held, in this case that the company were properly made parties to an action to restrain a forfeiture of stock made under a resolution of the directors, it being alleged that the number of directors had been illegally reduced, as the reduction of the directorate was the act of the company. *Christopher et al. v. Noxon et al.*, 4 O. R., Chy. D. 672, p. 140.

In an action for the cancellation of a tax deed:—Held, that the fact that the defendants might have a remedy over against the municipal corporation which had sold the land for taxes did

not make the corporation a necessary party to the action. *Charlton v. Watson et al.*, 4 O. R., Chy. D. 489.

Proper parties to an action for the removal of an instrument from the register where the registry of such instrument is not authorized by the registry Act. See *Ontario Industrial Loan and Investment Co. v. Lindsey et al.*, 3 O. R. 66.

Where B. gave a mortgage to W., and afterwards employed G. to do certain work and furnish materials on the property mortgaged:—Held, that although W. had commenced proceedings under an alleged lien in respect of the said property against B., subsequently to the commencement of which proceedings the work was done in respect of which the present lien was now claimed, it was not necessary that G. should have been made a party to the former action, and the fact that G. was not included in the master's report in that action, as among those holding liens against the property in question, was no bar to his maintaining this one. *Bank of Montreal et al. v. Haffner et al.*, 3 O. R., Chy. D. 183. Reversed in Appeal. See 20 C. L. J. 147.

3. Adding and Striking Out Parties.

(a) Admitting Third Parties to Defend.

The action was brought by one F. and his wife against Archibald F., to recover nine years arrears, under an annuity deed made by the defendant, to secure \$120 a year to the plaintiffs during their lives. Janet F., the defendant's wife, had joined in the annuity deed to bar her dower. Subsequently the defendant Archibald F. abandoned his wife and absconded. Janet F. then brought an action for alimony, and now applied to be let in to defend this action, on the ground that it was collusively brought for the purpose of defeating her suit for alimony, and to deprive her of her dower in the lands:—Held, upholding the order of the Master in Chambers, that Janet F. was entitled to be admitted to defend. *Ferris et ux v. Ferris*, 9 P. R. 443.—Taylor, Master.—Ferguson.

The defendant Clarkson, as assignee of the defendant Hicks for the benefit of creditors, had taken possession of the goods in question, on which the plaintiff claimed a lien under an unregistered agreement in the nature of a chattel mortgage. On motion of certain creditors they were made parties to the action, under Rule 103 O. J. Act, on the ground that they had a substantial interest in the subject matter of the action. *Kitching v. Hicks et al.*, 9 P. R. 518.—Winchester, Registrar, Q. B. D.

(b) Where Defendant Claims a Remedy Over Against a Third Party.

Under Rule 112, where in an action the plaintiff is entitled to recover against the defendant, against whom the action is brought, the defendant is precluded from trying questions arising between himself and a third party added at his instigation under Rule 108, in the trial of which the plaintiff has no interest, and which has the

effect of delaying the plaintiff in his recovery. *The Corporation of the Town of Dundas v. Gilmour et al.*, 2 O. R., C. P. D. 463.

Defendants, sued by the plaintiffs for the amount due under a lease of a toll-gate, brought in W. as a defendant, alleging that an agreement to commute tolls, payable by W., had been made by the plaintiffs, and claiming as a set off the difference between such commutation and the tolls otherwise payable by W. This agreement having been disproved, the parties proceeded to try the question as to the liability of W. to the original defendants, in which the plaintiffs had no interest, and judgment was given in favour of the original defendants:—Held, that such judgment must be set aside. *Ib.*

(c) Other Cases.

The defendant and his brother partitioned their lands, defendant taking the west half of a lot, on which was an hotel, and the brother the east half, on which a store was erected, each supposing that the division line ran between the two buildings. The defendant sold his portion to the plaintiff, who had lived opposite for many years, the land being described as the west half according to a plan. The hotel encroached upon the east half at the rear end of the building about thirty-four inches, the value of the land encroached upon being very trifling. It appeared that the hotel could be moved for about \$40; and that defendant had offered to procure a lease of the portion encroached upon at a nominal rent, which was refused. The plaintiff charged that the defendant had falsely and fraudulently represented that the division line between the two lots ran between the two buildings, and brought an action therefor, praying for a rescission of the sale, for an account of improvements, and for damages. The deed was drawn after the alleged misrepresentation and after the plaintiff knew of the encroachment, and nothing was then said about the line. The learned judge at the trial found that there was no false representation, but he added defendant's brother as a party, and directed him to convey to the plaintiff the land encroached upon:—Held, that the action could not be maintained, for, among other reasons, the plaintiff knew of the encroachment when he took the conveyance, which made no provision respecting it; and she had so dealt with the property as to preclude her from claiming a rescission:—Held, also, that under the circumstances, more fully stated in the report, the brother should not have been added; and the plaintiff, having based her action on the ground of fraud, should not be allowed to rely upon an entirely different ground. *Dunbar v. Meek*, 32 C. P. 195.

Action by plaintiffs for \$460, as assignees under an assignment from the assignee in insolvency of the estate of W. & A. At the trial the learned judge held that, under the circumstances set out in the report, the amount did not pass to the plaintiffs under the assignment to them, but belonged to the insolvents, but he refused to add the insolvents as co-plaintiffs, because the defendant was not in a position to know whether he had a defence as against them. During the following sittings of the court, the defendant

having had sufficient time to ascertain his rights, and shewing no defence, the court under the O. J. Act, Rule 90, directed the insolvents to be added, and judgment to be entered for the plaintiffs for the amount claimed, but, under the circumstances, without costs. *Woodward et al. v. Shields*, 32 C. P. 282.

One C., a practising barrister, dealt largely in land transactions, but it was not shewn that he depended thereon for his living. Becoming insolvent, proceedings under the Insolvent Act of 1875 were taken against him. The plaintiff was assignee of a mortgage made by C., and brought suit thereon against H., the assignee in insolvency of C., and D. and others, the owners of parts of the mortgaged lands. It was objected by D. that C. should have been made a party:—Held, that C. was not a trader within the meaning of the Insolvent Act and that nothing passed to the assignee in the insolvency proceedings. C. was therefore declared to be a necessary party, and leave was given to add him as a defendant. *Joseph v. Haffner*, 29 Chy. 421.

Plaintiff sued defendant for flooding his land by means of a mill dam, after the determination of a license to do so. The Great Western Railway had turned the waters of the stream into another channel, which was not deep enough to carry off all the water if the defendant's dam was removed, so that by the act of the railway company the plaintiff could not obtain complete relief by succeeding against defendants:—Held, that the plaintiff should have liberty under Rules 91, 103, to add the railway company as defendants. *Head v. Bowman*, 9 P. R. 12.—Dalton, Master.

Before a redemption suit one of the mortgagor's surviving children died an infant and intestate:—Held, that this suit enured to the benefit of those entitled to her share, including her mother as tenant for life, under R. S. O. c. 105, s. 27, and Held, also, that the mother should be directed to be made a party in the master's office under G. O. 438, since the present case did not fall under the Judicature Act. Semble, if under that Act the same might have been directed under Rule 89. *Faulds v. Harper et al.*, 2 O. R., Chy. D. 405.

The plaintiff consigned goods to parties in England, and shipped them by the defendant companies on bills of lading, describing them as shipped by the plaintiff, to be delivered to — order or his assigns, he or they paying freight. The plaintiff endorsed the bills of lading to various parties in England, to whom he had sold the goods. The consignees paid the drafts drawn upon them for the price, and the goods having been seriously damaged in transit, they made claim upon the plaintiff for the loss. The plaintiff now sued for the damage, and was nonsuited on the ground that he had not sufficient interest, or was not the proper person to sue. The court without deciding as to the plaintiff having no right of action, or the effect of R. S. O. c. 116, s. 5, set aside the nonsuit, and directed a new trial with leave to the plaintiff to add as co-plaintiffs any or all of the consignees or endorsees of the bills of lading, the evidence already given to stand with any additions the parties might desire, reserving all costs. *Hately et al. v. The Merchants Despatch Co.*, 2 O. R., Q. B. D. 385. See S. C., 4 O. R. 723, p. 84.

Since a way of necessity can only pass with the grant of the soil, the owner of the legal estate in the land as to which it is claimed, should be a party to an action claiming such way and where an equitable owner of the land sued, he was permitted to make the owner a co-plaintiff by amendment at the hearing. *Saylor v. Cooper*, 2 O. R., Chy. D. 398.

III. STATEMENT OF CLAIM.

The plaintiff indorsed his writ of summons and filed his statement of claim to recover possession of the land in dispute, as being the assignee of a lease made by him to the defendants, who assigned to a third party, who assigned and surrendered to the plaintiff. The defence was that the lease was in effect a mortgage, and fraud and want of consideration were alleged:—Held, that the plaintiff could not amend his statement of claim, and ask a foreclosure of the land as mortgagee. *McIlhargey v. McGinnis et al*, 9 P. R. 157.—Wilson.

Held, that the mention of the date of issue of a writ in a statement of claim was essential, but leave was given to amend on payment of costs. *Scott v. Creighton*, 9 P. R. 253.—Dalton, Master.

An order allowing further time to file a statement of claim should not be made ex parte. *Wigle v. Harris*, 9 P. R. 276.—Proudfoot.

If a statement of claim is filed after the time limited by Rule 158, (a) (three months from appearance entered,) the action will not be dismissed for its non-delivery, but the statement is irregular and may be struck out. In this case, under the circumstances, the time for delivery was extended upon payment of costs of the motion. *Clarke v. McEwing*, 9 P. R. 281.—Dalton, Master.

New trial granted in action for malicious prosecution with leave to plaintiff to amend the statement of claim. *Macdonald v. Henwood et al.*, 32 C. P. 433.

IV. STATEMENT OF DEFENCE.

Though each paragraph of a statement of the defence should, under Rule 128, as nearly as may be, contain a separate allegation, it need not contain a separate defence. *The Union Fire Ins. Co. v. Lyman*, 46 Q. B. 453.

V. SET-OFF AND COUNTER CLAIM.

The plaintiff sued defendant on an account assigned to him by one F. Defendant, by his counter-claim, alleged a set-off against F., and adding F. as a defendant claimed judgment against him for a balance due:—Held, that the counter-claim as against F. must be disallowed, the defendant having no right in this suit to raise an issue between himself and a third party, with which the plaintiff was not concerned. *Romann v. Brodrecht—Brodrecht v. Fick*, 9 P. R. 2.—Dalton, Master.

Held, that to an action by an assignee of an account for the price of lumber and staves deliv-

ered by the assignor to the defendant under two certain contracts therefor, the defendant, under R. S. O. c. 116, ss. 7, 10, and the Judicature Act, ss. 12, 16, and Rule 127, can set up as a defence a claim for damage for the non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior quality of those delivered. Per Osler, J., his right to do so depended wholly upon R. S. O. c. 116, s. 10. In this case the learned judge, at the trial, having refused to entertain the former defence, a new trial was ordered. *The Exchange Bank v. Stinson*, 32 C. P. 158.

In an action for the recovery of land, and for mesne profits, a counterclaim for damages for illegal distress against the plaintiff and his bailiff who executed the distress, was held to be good. *Dockstader v. Phipps*, 9 P. R. 204.—Dalton, Master.

A promissory note made by the defendant had been held by the Consolidated Bank, and after its maturity the defendant transferred certain timber limits to the bank as collateral security for the payment of the note, which limits the bank sold. The plaintiffs became holders of the note for value after dishonour and after the timber limits transaction and brought this action upon the note. A counter claim against the plaintiffs and the bank by the defendant setting up that the bank had sold the timber limits without authority and for an insufficient price, were thereby guilty of a breach of trust, and claiming that the defendant should be permitted to set off so much of his claim therefor against the bank as would satisfy the balance claimed upon the note was held bad and struck out as not being properly a counter claim. Per Cameron, J., unless required by the clear legal rights of the defendant for his protection against the plaintiff's action, counter claims are not to be favoured. *Canadian Securities Co. v. Prentice*, 9 P. R. 324.—Dalton, Master—Cameron.

Held, per Ferguson, J., that the O. J. Act, Rule 17 and G. O. Chy. 647, do not apply to counter claims. *Klein et al. v. The Union Fire Ins. Co. et al.*, 3 O. R., Chy. D. 234.

See *Glass v. Glass*, 9 P. R. 14, p. 231; *Francis v. Francis*, 9 P. R. 209, p. 394.

VI. DEMURRER.

The defendant having filed his statement of defence, the plaintiff replied thereto by amending his claim, adding to the statement two new paragraphs which would have been demurrable if pleaded as a reply. The matters thereby set up, when separated from the rest of the statement, did not disclose any distinct cause of action. Thereupon the defendant served an amended statement of defence, and demurred to the two paragraphs which had been so added. In view of the fact that the paragraphs which had been so added did not disclose any separate or substantial cause of action, and that the demurrer, however decided, could not advance the cause, the court (Boyd, C.) overruled the demurrer without costs, as it was the first occasion the point had arisen under the Judicature Act. *Rumohr v. Marx*, 29 Chy. 179.

The propriety of partial demurrers which do not bring up the whole or even a substantial question between the litigants, thus tending to increase costs, considered and remarked upon. *Id.*

The bill alleged that the municipal councils of the respective corporations had adopted and sanctioned certain terms and conditions for dividing and settling the several liabilities and assets of the corporations upon their separating, and that both parties accepted such settlement as a final settlement between them, and acted thereupon:—Held, on demurrer, that it was not necessary to allege that such acceptance was by by-law; although:—Sembles, that at the hearing it might be necessary to establish that such was the fact. *The Corporation of the Village of Gravenhurst v. The Corporation of the Township of Muskoka*, 29 Chy. 439.

Where the allegations in a bill of complaint were of an ambiguous character, hovering between two inconsistent alternatives, neither of which supported the conclusion suggested by the pleader, a demurrer for want of equity was upheld. The court will regard the intuits with which the allegations in a bill of complaint are made, and will not allow the prayer for general relief to control the obvious frame of the record. The primary object of the bill was to enforce a contract of sale of land between N. an insolvent, of whom the plaintiff was assignee, and one C. N. was made a party because, as the bill alleged, said C. N. pretended that one L. who had advanced money to N. on the security of the property, had conveyed his interest to C., while the plaintiff charged the contrary, and alleged that if such conveyance was made yet it was without value, and made to defeat N.'s and L.'s creditors. A demurrer by C. N. was allowed, on the grounds above mentioned, and because the bill was multifarious. *Gunn v. Trust and Loan Co. et al.*, 2 O. R., Chy. D. 393.

Misjoinder of parties is, since the Judicature Act, no longer a ground for demurrer. *Young et al. v. Robertson*, 2 O. R., Chy. D. 434.

In an action to set aside a conveyance of land as a fraudulent preference, the non-averment that the plaintiffs sued on behalf of all other creditors is not ground for demurrer, but a mere informality, to be dealt with under O. J. Act, Rules 103, 104. In an action by a solicitor to recover the amount of a bill of costs, the fact that he does not, in his statement of claim, allege that the bill was delivered a month before action brought, is not now, any more than before the Judicature Act, ground for demurrer, but only for defence. *Scane et al. v. Duckett et al.*, 3 O. R., Chy. D. 370.

In an action by the Attorney-General, upon the relation of the Bursar of Toronto University, to recover possession of certain lands claimed to be vested in Her Majesty for the benefit of the University, the defendants pleaded that the said lands had been, with the assent of the University and bursar, taken possession of by them for the purposes of their railway under their statutory powers, and that they had since retained and then were in possession thereof, and they also pleaded the statute of limitations:—Held, on demurrer, that it was not necessary to set out specifically the statutes alluded to, in the various proceedings connected with the expropriation of

the land, and the defence was not objectionable, upon demurrer, on the ground of want of certainty, by reason of its merely general allegation of compliance with the statutory requirements:—Held, also, that the mere allegation that the defendants were in possession afforded a good defence in law in such an action, and put the plaintiff to the proof of his cause of action, under Rule 144. *Attorney-General v. The Midland R. W. Co.*, 3 O. R., Chy. D. 511.

In the case of a partial demurrer to a pleading under Rule 189, if any one or more paragraphs be demurred to, the court will look at any other paragraph or paragraphs bearing on the same matter of defence, and if the whole taken together disclose a sufficient defence, the demurrer must be overruled. When a pleading is ambiguous or uncertain, the proper remedy is to apply in Chambers to strike out or amend the defective matter, and a demurrer on that ground will not lie. *Id.*

Held, in this case, that the demurrer being partly successful, and partly unsuccessful, neither party should get costs. *Id.*

When upon the argument of an appeal, the respondent omitted to point out in what respect the replications of the plaintiff were demurrable, the court refused to wade through the mass of pleading which had been filed in the court below, to find it out for themselves; and being of opinion, in the absence of argument, that the pleading was good, affirmed the judgment of the court below upon such pleadings. The unnecessary and improper length of pleadings remarked upon. *Quintan v. The Union Fire Ins. Co.*, 8 A. R. 376.

VII. ADDING AND AMENDING PLEAS.

1. Generally.

Action on a life policy. The application contained a number of questions and answers, and at the foot was a declaration, signed by the assured, that to the best of his knowledge and belief the foregoing statements and other particulars were true: that the declaration should form the basis of the contract; and that if any untrue averment had been intentionally made therein or in the replies to the company's medical adviser in connection therewith the policy should be void. By the policy the declaration and "relative papers" were made the basis of the contract, with a proviso that if any fraudulent or wilfully untrue material allegation was contained in said declaration; or if it should thereafter appear that any material information had been withheld, and any of the matters set forth had not been truly and fairly stated, then the policy should be void. To the questions in the application as to the name and residence of usual medical attendant, and for what serious illness had he attended, the assured answered "none": and to the questions by the medical adviser as to what other disease or personal injury and from whom had he received professional assistance, &c., the assured answered "none." It was found that these answers were wilfully untrue, and that the information was wilfully withheld from and was material to be stated to the company:—Held, that these answers constituted a breach of the express contract between the parties and therefore the policy was void. The pleas setting up these defences

were added at the trial, and after the case had been in progress for some time. The action was commenced before the Judicature Act came in force, but the trial took place thereafter:—Held, that, whether under sec. 8 of the Administration of Justice Act, or under Rule 128 of the Judicature Act, the pleas were properly added. *Russell v. The Canada Life Assurance Co.*, 32 C. P. 256. Affirmed, 8 A. R. 116.

Allowing plea of promissory notes being insufficiently stamped.—Pleading want of stamps. See *Caughill v. Clarke*, 3 O. R. 269, p. 74; *S. C.* 9 P. R. 471, p. 74.

The judgment of the court below (32 C. P. 131) overruled the demurrer on the assumption that the plea had been amended according to leave given, but the appeal book did not shew the amendment to have been made, and the defence as set out in the printed case was held bad on demurrer, and the appeal by the plaintiff allowed with costs. Cameron J., dissenting, who thought that under the circumstances the plea should be treated as amended pursuant to leave granted by the court below, and that the judgment of the court below which was in the opinion of this court right as it was given, should not be reversed. *Boswell v. Sutherland*, 8 A. R. 233.

O. was a member of Court Maple of the defendants' order, and was insured under the endowment provisions thereof for \$1,000. This court left the order in a body and joined another order of Foresters, and it was in consequence suspended. On joining the new order it was arranged that O., who was in ill-health and had gone to California for change, should be taken and insured with the others. By the rules of defendants' order members of suspended courts in good standing at suspension were, on application within thirty days, to the supreme secretary, and payment of a fee of \$1, to receive a card of membership and be entitled to the endowment, provided they paid all assessments as they fell due, and affiliated with another lodge of the order; but, if after thirty days, they must pass a medical examination. On his return from California, O. on ascertaining that the Court Maple had been suspended, within the thirty days, being then in good standing, applied to the defendants' supreme secretary for his card of membership, tendering \$1 and assessments due, which was refused on the ground that a medical certificate was necessary. O., by reason of his not having the card, was prevented from affiliating, though he endeavoured to do so, with another court. By the endowment certificate the \$1000 was payable to the widow, orphans, or legal heirs of O., and by endorsement thereon O. directed the amount to be paid to the plaintiff, the widow. At the trial an amendment was asked, to set up a forfeiture of the policy by reason of O. having gone to California without a permit, which was refused by the judge:—Held, under the circumstances the refusal was proper. Quære, whether the way, cause, and manner in and for which O. and the other members of Court Maple left it and joined in a body another order might not, if properly pleaded, have required some consideration. The frame and effect of the pleadings in this case considered. *Oates v. The Supreme Court of the Independent Order of Foresters*, 4 O. R., C. P. D. 535.

VIII. WHEN CAUSE IS AT ISSUE.

A cause is at issue where a joinder of issue has been delivered, or where three weeks have elapsed after statement of defence has been delivered. *Schneider v. Proctor*, 9 P. R. 11.—*Dalton, Master*.

IX. COSTS.

Where the original plaintiffs in an action were not entitled to any relief but by amendment, and a party was added to whom relief was granted:—Held, that the defendants were entitled to costs of the action up to the date of the amendment. *Clarkson et al v. White et al*, 4 O. R., Chy. D. 663.

See *Woodward et al v. Shields*, 32 C. P. 282, p. 606; *Scott v. Creighton*, 9 P. R. 253, p. 607; *Clarke v. McEwing*, 9 P. R. 281, p. 607; *Schwob v. McGloughlin*, 9 P. R. 475, p. 603.

(Before the Judicature Act, 1881.)

PLEADING AT LAW.

I. GENERAL PRINCIPLES.

1. Embarrassing Pleadings.

The plaintiff alleged in one count in trover that the defendant converted to his own use, or wrongfully deprived the plaintiff, &c.:—Held, overruling *Bain v. McKay*, 5 P. R. 471, that the count was not embarrassing. *Taylor v. Adams*, 8 P. R. 66.—*Dalton, Q. C.*

The C. J. P. Act, (R. S. O. c. 50), s. 120, empowers the court or a judge to strike out pleas not merely where they are embarrassing, because confused in terms and so difficult to understand, but where they combine several defences in one plea, or are repetitions of a defence already pleaded, and may thus be embarrassing, or prejudice a fair trial. In this case, being an action on promissory notes, the defendant having pleaded total failure of consideration, added other pleas repeating that defence, and setting up besides another agreement, not necessarily connected with the notes, and so stated as to leave it uncertain whether it was intended as a separate defence or as supporting the other defence:—Held, affirming the judgment of Cameron J., that such pleas were properly struck out. *Abell v. McLaren*, 31 C. P. 517.

2. Departure.

To the plea of "non est factum," the plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all parties as a valid policy, but that the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal or ordered to affix it:—Held, a good replication and not a departure from the declaration. *Wright v. London Life Ins. Co.*, 5 A. R. 213.

Action on a debenture, by which the defendants agreed to pay to the bearer £200 stg. at the

office of a named bank, and on a named day, upon presentation and surrender there of the debenture. Averment of performance of all conditions precedent. Breach non-payment of the principal sum:—Held, by Osler, J., and affirmed by the full court, that the presentation and surrender of the debenture at such place and date were conditions precedent, and the performance of such conditions having been averred in the declaration, a replication alleging presentation on a later day was a departure. *The Montreal City and District Savings Bank v. The Corporation of the County of Perth*, 32 C. P. 18.

3. Certainty and Particularity.

Declaration, that D., by writing, for valuable consideration, duly assigned to plaintiff the sum of \$500, money due and to become due to D. by defendants, whereof defendants had notice in writing, and at the time of and after said assignment, and after said notice, and before action, defendants were indebted to D. in money sufficient to pay the sum so assigned to plaintiff, &c.:—Held, on demurrer, bad, as not setting forth any fact from which the existence of and promise to pay a debt would be implied by law. *Mitchell v. Goodall*, 44 Q. B. 398, and *Brice v. Baonister*, L. R. 3 Q. B. D. 569, distinguished. *Smith v. The Corporation of Ancaster Township*, 45 Q. B. 86.

To an action for maliciously making demand for an assignment under the Insolvent Act the defendant's third plea after setting up a variety of dealings between the parties, shewing that the plaintiff had from time to time failed to meet his engagements with defendants, concluded that the plaintiff being indebted to the defendants in the sum of \$1,400, and being unable to pay the same or to meet his engagements, and the plaintiff being also to the knowledge of the defendants indebted in large sums to divers other persons, creditors of the plaintiff, the defendants bona fide believing the plaintiff to be insolvent within the meaning of the Insolvent Act of 1875, and amending Acts, and having reasonable and probable cause for so believing, and without malice made a demand on the plaintiff, &c.:—Held, a good plea, although it was not expressly averred in the words of sec. 4 that the plaintiff had ceased to meet his liabilities generally as they became due. Quære, whether that expression means his liabilities to the particular creditor or to his creditors generally. *Nagle v. Timmins et al.*, 31 C. P. 221.

See *Corporation of the Town of Peterborough v. Edwards*, 31 C. P. 231, p. 27.

II. DECLARATION.

1. Venue.

In an action for damages caused by the non-repair of a highway in the county of York the venue was laid in Peel, but the declaration did not state in what county the highway was situate. The venue being admitted to be wrong, plaintiff was allowed to amend his declaration. *Brown v. The Corporation of the County of York*, 8 P. R. 139.—Dalton, Q. C.

In an action wherein the sheriff is plaintiff or defendant, the opposite party, if he so desires, may have the action tried in the county adjoining that in which the sheriff resides. *Brannen v. Jarvis*, 8 P. R. 322.—Galt.

2. Changing Venue.

Held, that there is no appeal to the full court in term from an order of the clerk of the Crown and Pleas, made on an application to change the venue in County Court cases under R. S. O. c. 50, s. 155, but the only appeal in such cases is to a judge in chambers under sec. 31 of the Act:—Held, however, that if an appeal did lie to the full court it might be made direct thereto without first going before a judge in chambers. Semble, in such cases the proper course is to follow, as laid down in the Act, the practice in force in the Superior Courts, and that the mere fact of the cause of action having arisen in the county to which it is sought to change the venue is not, of itself, sufficient to outweigh any actual preponderance of convenience arising from other causes in favour of retaining the venue where the plaintiff had laid it. *Mahon et al v. Nicholls*, 31 C. P. 22.

3. Time for Declaring.

A plaintiff must declare within one year after the service of the writ of summons, inclusive of the day of service. *Murchison v. Canada Farmers' Ins. Co.*, 8 P. R. 451.—Dalton, Q. C.

4. Form of.

Remarks as to the proper form of declaration in an action for negligence in investing money where the defendant was not paid by the lender but by the borrower. *Carter v. Hatch*, 31 C. P. 293½

III. PLEAS IN ABATEMENT.

The defendant pleaded to an action in a Superior Court, on a writ specially endorsed for \$410, that there was a suit pending in a County Court brought by the plaintiffs against the defendants, for the same cause of action:—Held, that the plea should aver that the cause of action in the first suit was within the jurisdiction of the County Court. *Morgan v. Aull*, 8 P. R. 429.—Dalton, Q. C.

The plaintiff brought his action for damages caused by the non-repair of a highway in the county of York, and laid the venue in Peel, but the declaration did not state in what county the highway was situate. Defendant pleaded not guilty; and (2) that the court ought not to have further cognizance of the action, because the cause of action is local, and arose in the county of York and not in the county of Peel:—Held, that this was properly a defence in bar, and not in abatement:—Held, that whether a plea in abatement, or to the jurisdiction, it could not be pleaded with a plea in bar. *Brown v. The Corporation of the County of York*, 8 P. R. 139.—Dalton, Q. C.

IV. TIME FOR PLEADING.

A defendant has four days only to plead to a new assignment. *McDonald v. McKinnon*, 8 P. R. 13.—Dalton, Q. C.

V. PLEAS IN BAR AND SUBSEQUENT PLEADINGS.

1. *Similiter*.

With his joinder of issue, the plaintiff served notice of trial for the Chancery sittings. Defendant afterwards served a *similiter* and jury notice:—Held, that the *similiter* and jury notice were good, and that the notice of trial must be set aside. *McLaren v. McCuaig*, 8 P. R. 54.—Dalton, Q. C.

The plaintiff joined issue upon defendant's pleas and at the same time filed a *similiter*, without a jury notice, for the defendant. Afterwards the defendant filed a second *similiter*, and with it a jury notice:—Held, that defendant should have filed a jury notice with his pleas; that the first *similiter* was good, that the second was unnecessary, and must, together with the jury notice, be struck out as bad. *Hyde v. Casmea*, 8 P. R. 137.—Dalton, Q. C.

2. *Other Cases*.

Held, that it was no objection to a replication that it shewed for the first time that interest only was claimed, for that being merely an accessory to the principal, need not be claimed as damages. *Montreal City and District Savings Bank v. Corporation of the County of Perth*, 32 C. P. 18.

Held, that a plea which, after traversing the presentation of the debenture *modo et forma*, alleged it was afterwards paid and was then duly surrendered to the defendants, was a good plea, as the plaintiffs, by excepting to it, admitted payment of the principal sum, which would include the nominal damages, if any, alone recoverable for its detention, while the surrender of the debenture would shew that the payment was in satisfaction and discharge of the debt, if not of the damages also; that it was no answer to the plea to say that the surrender before the damages were paid was by mere oversight and inadvertence so long as it appeared to be intentional; but that it would be a good answer to say that such delivery was on the express agreement that the right to damages was reserved:—Held, also, that after failure to make a due presentation, there could be no recovery until a demand was made for payment, which must be made on the defendants. *Osborne v. Preston & Berlin R. W. Co.*, 9 C. P. 241, and *Fellowes v. Ottawa Gas Co.*, 19 C. P. 174, commented upon. *Ib.*

In an action for calls defendants pleaded that plaintiffs' license had been suspended:—Held, on demurrer, that the defence should have alleged notice in the *Gazette* of the suspension of the license, pursuant to R. S. O. c. 160, s. 34, and 42 Vict. c. 25, s. 3, sub-s. 7, but an amendment was allowed, this point not having been taken. *Union Fire Ins. Co. v. Lyman*, 46 Q. B. 471.

The declaration alleged that the defendant laid an information that certain harness had been stolen by the plaintiff, whereas the informa-

tion proved was qualified by the addition of the words "as he supposed":—Held, no variance. *Colbert v. Hicks*, 5 A. R. 571.

The plaintiff lent P. a sum of money, for securing the repayment of which P. gave a chattel mortgage on goods which P. was to retain possession of, and the defendant executed a bond, conditioned that in default of payment the goods should be forthcoming for the purpose of seizure and sale under the mortgage. Before the day of payment arrived the goods were destroyed by fire, and an action having been commenced against the defendant on his bond, he pleaded the fact of such destruction without any default on his part:—Held, bad on demurrer, for not negating any default on the part of P. (Cameron, J., dissenting.) *Boswell v. Sutherland*, 8 A.R. 233.

See *Creighton v. Chitick et al.*, 7 S. C. R. 348, p. 56.

VI. EQUITABLE PLEA.

Declaration upon a promissory note. Third plea, "that the defendant made the said note with and for the accommodation of one W. C., at the request of the plaintiffs, in respect of a pre-existing debt, then due to the plaintiffs, by the said W. C. alone, and the said note was drawn payable on demand, with interest at ten per cent., and except as aforesaid there was never any value or consideration for the making or payment of the said note by the defendant." Fourth plea, on equitable grounds, that the defendant made the note jointly and severally with W. C. for his accommodation, and as his surety only, to secure a debt due to the plaintiffs, and that after the note became due the plaintiffs gave W. C. an extension of time for the payment of the note:—Held, that the third plea was good, for it shewed that no extension of time had been given, and therefore that there was no consideration, and that the fourth was not an equitable plea, and must be amended by striking out the words, "upon equitable grounds," and the jury notice served with it allowed to stand. *Merchants' Bank v. Robinson*, 8 P. R. 117.—Dalton, Q. C.

VII. DEMURRER.

A count having been drawn so as to invite a demurrer the demurrer was overruled without costs. *Smith v. Corporation of Ancaster Township*, 45 Q. B. 86.

VIII. AMENDMENT OF PLEADINGS.

1. *Parties*.

In ejectment the plaintiff obtained a verdict, but as the defendant had made improvements on the land under a bona fide belief that the land was his own he was held entitled to the relief given by R. S. O. c. 95, s. 4, and the Master in Chancery at Ottawa was directed to ascertain the value of such improvements and report thereon which he did. A rule nisi having been obtained to refer back the report for the reasons stated, it appeared that after the report the defendant died intestate, and that no personal representative had been appointed, leaving a widow who was residing on the land in question and a son by a

former wife but no children by the second wife, and also that defendant had assigned all his interest in the sum to be found due for improvements to a loan society. The court permitted the plaintiff to amend his rule nisi by calling on the widow or son of the deceased and on the loan society to shew cause why they should not be made parties to the suit and why the former should not be appointed under A. J. Act, s. 9, to represent the estate of the defendant for the purposes of this motion and all subsequent proceedings in the reference, and why in that event the relief asked by the rule should not be granted. The rule to be returnable on fourteen days' notice before a single judge. *McCarthy v. Arbuckle*, 31 C. P. 48.

Leave was granted to amend a declaration where "the Commissioners of the Cobourg Town Trust" were sued as a corporation, by substituting the names of the commissioners. *McSherry v. Corporation of the Cobourg Town Trust*, 45 Q. B. 240.

After issue joined one of two plaintiffs gave to the defendant a release under seal of all actions and demands. The defendant thereupon moved to stay all proceedings in the suit:—Held, that the defendant should plead the release, and that he was not entitled to a stay of proceedings, and the remaining plaintiff was allowed to strike out the name of the other plaintiff. *McAlpine et al. v. Carling*, 8 P. R. 171.—Osler.

2. Other Cases.

The plaintiffs applied at the trial to amend their declaration by striking out a term of the bargain therein alleged, but not proved, that the plaintiffs would sell as much of the tea as they could:—Held, an amendment which was imperative under R. S. O. c. 50, s. 270. *Lumsden et al. v. Davis*, 46 Q. B. 1.

Adding plea of fraud, in action against surety, at second trial. See *The Corporation of the Village of Gananoque v. Stunden*, 1 O. R. 1.

Power of Supreme Court to allow amendment. See *The South West Boom Co. v. McMillan*, 3 S. C. R. 700; *Moore v. The Connecticut Mutual Life Ins. Co. of Hartford*, 6 S. C. R. 634.

IX. WAIVER OF OBJECTIONS.

The obtaining of an order for time to reply waives an objection that no notice to reply was served, and takes the place of such notice. *Lock v. Todd*, 8 P. R. 60.—Dalton, Q. C.

(Before the Judicature Act, 1881.)

PLEADING IN EQUITY.

I. BILLS.

1. Form of.

(a) Multifariousness.

The owner of real estate died intestate, and A. the husband of one of his sisters, took possession of the property and appropriated to his own use the rents and profits thereof, whereupon some

of the surviving brothers and sisters of the intestate filed a bill against A., to which they made all the next of kin of the intestate parties, calling upon A. for an account of rents received, and seeking to restrain him from further intermeddling therewith. The court [Spragge, C.] on demurrer by A. held the bill was not multifarious. *Young v. Wright*, 27 Chy. 324.

See *Campbell v. Campbell*, 29 Chy. 252, p. 620.

(b) Certainty and Particularity.

In a bill seeking to obtain the benefit of a sale of land freed from the dower of the widow of the deceased owner, it was alleged that he had died at such a time as would, if true, bar the widow's right to dower, and submitted "that the defendant E. B. (the widow) is not entitled to dower":—Held, a sufficient allegation that the defendant's right to dower was barred by the statute, though it omitted to state that this was the legal result of any particular statute. *Barks v. Bellamy*, 27 Chy. 342.

In a bill filed by a mortgagor against his son, a bidder at the sale by another of the defendants, a loan company, to which bill the company and one B. were also defendants, it was alleged that it had been agreed between the son and B. that in consideration of the son securing to B. a debt of the plaintiff, B. would advance the deposit necessary to enable the son to buy the land at the sale; that the son should attend and buy in the land which he accordingly did; that in consequence of B.'s refusal to make the promised advance the son was unable to carry out the sale; that the bidding of the son deterred others present from bidding, and that B. afterwards privately bought the land at a great under value to the loss of the plaintiff:—Held, on demurrer that the bill sufficiently, though inartificially alleged that by reason of B.'s agreement and refusal to make the advance agreed upon, he had occasioned an abortive sale and profited thereby to the loss and damage of the plaintiff. *Campion v. Brackenridge*, 28 Chy. 201.

The bill stated that the plaintiff was grandson of L., who had died intestate:—Held, that this did not sufficiently state the title of the plaintiff. *Lario v. Walker*, 28 Chy. 216.

A railway company paid to tenants for life the full price of the land conveyed by them to the company for their line of railway, and on the cesser of the life-estate the parties entitled in remainder filed a bill stating that the railway company assumed to purchase the lands for the right of way; that the company alleged that they had paid the full consideration for the land to the tenants for life; submitting that if the company did make such payment they did so in their own wrong, and asking for payment of the plaintiff's share of the purchase money:—Held, (1), that the word "assumed" was a sufficient allegation of the fact of sale and conveyance. But (2), that the statement that the company "alleged" that the purchase money was all paid to the vendors was not such a positive statement of the fact of payment to the tenants for life as to make them proper parties to the bill, and a demurrer was allowed on this ground. *Ouston v. The Grand Trunk R. W. Co.*, 28 Chy. 428.

(c) *Prayer for General Relief.*

If the allegations in a bill state a case entitling a party to relief, he may under the general prayer have it, though his specific prayer may have been for other relief; but a plaintiff cannot take advantage of the ambiguity of his own pleading so as to claim upon facts stated in the bill *alio intuitu*, a relief entirely foreign to the scope of the bill. The bill, which was filed against the executors of C. S., his widow and children, prayed that the proceeds of an insurance policy which had been effected by the deceased for his wife and children should be subjected in the hands of the executors, to the payment of moneys lent by the plaintiff to the deceased, and applied by him to the support of his children, and that the executors might be restrained from paying over the money. *Blake, V. C.* overruled a demurrer thereto, and under the prayer for general relief granted administration:—Held, reversing this decision, that under the circumstances the plaintiff was not entitled to the administration decree. *Gaughan v. Sharpe et al.*, 6 A. R. 417.

See *Gunn v. Trust and Loan Co. et al.*, 2 O. R. 393 p. 609; *Jessup v. Grand Trunk R. W. Co.*, 3 A. R. 128.

2. *Cross Bill.*

The object of a cross bill ordinarily was to obtain discovery on the part of the plaintiff in the cross cause to be used in the original cause; or in order to obtain full relief in respect of the subject matter of litigation in the original cause. Therefore, where a bill was filed to restrain arbitrators, on the ground of irregularity in their appointment, from acting in respect of matters in dispute between the plaintiff and defendant companies, and the defendant company by their answer asked that if the court entertained the case it should afford them relief in respect of the matters in dispute between the companies:—Held, that this was not the proper office of a cross bill, and therefore could not be set up as a subject of cross relief by the answer. *Direct Cable Co. (Limited) v. Dominion Telegraph Co.*, 28 Chy. 648.

II. PARTIES.

1. *Persons Suing on Behalf of a Class.*

Where a suit is instituted by a judgment creditor, who has not placed an execution against lands in the hands of the sheriff, in order to set aside a deed as fraudulent, he must sue on behalf of all creditors of the defendant, and the fact that the deed was made by a third party in consideration of money paid by the debtor does not alter the rule of pleading in this respect. *Morphy v. Wilson*, 27 Chy. 1.

Where a right of suit exists in a body of persons too numerous to be all made parties, the Court will permit one or more of them to sue on behalf of all, subject to the restriction that the relief prayed is one in which the parties whom the plaintiff professes to represent have all of them an interest identical with that of the plaintiff. But where a mutual insurance company had established three distinct branches, in one of which, the water-works branch, the plaintiff insured, giving his promissory note or under-

taking to pay \$168, and the company made an assessment on all notes and threatened suit in the Division Court for payment of such assessment, whereupon the plaintiff filed a bill "on behalf of himself and the other policy holders associated with him as hereinafter mentioned," alleging the company was about to sue him and the other policy holders in said branch, that large losses had occurred in the company prior to the time of his effecting his insurance, and insisting that he and the other policy holders could be properly assessed only in respect of such losses as had arisen since they entered the company, and praying that the necessary inquiries might be made and accounts taken, alleging that the Division Courts had not the machinery for that purpose:—Held, that according to the statements of the bill, the policy holders in the water-works branch were not represented in the suit, and a demurrer on that ground filed by the company was allowed with costs. *Thomson v. Victoria Mutual Fire Ins. Co. et al.*, 29 Chy. 56.

The plaintiff filed her bill for alimony, alleging that a conspiracy had been entered into between her husband and the other defendant to prevent her realizing any alimony that might be awarded her, and that for that purpose her husband fraudulently conveyed all his lands to the co-defendant, and the bill prayed to have such conveyance declared fraudulent. The grantee in the impeached conveyance demurred for multifariousness, for want of equity, and want of parties. The court (*Boyd, C.*) overruled the demurrer on the first two grounds, but allowed the demurrer for want of parties; the plaintiff not having recovered judgment and execution, could only sue in a representative capacity—that is on behalf of herself and all other creditors. *Longway v. Mitchell*, 17 Chy. 190; *Turner v. Smith*, 26 Chy. 198; *Culver v. Swayze, Ib.* 395, and *Morphy v. Wilson*, 27 Chy. 1, considered and followed. *Campbell v. Campbell*, 29 Chy. 252.

See *The City Light and Heating Company et al. v. Macfie et al.*, 28 Chy. 363, p. 623.

2. *Executors and Administrators.*

An action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come to the hands of another. Therefore where a railway company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the company for the purposes of their road, and subsequently the remainderman filed a bill against the company and the representatives of the tenant for life, seeking to obtain payment from the company of the proportion of purchase money payable to the remainderman:—Held, that the executors were properly made parties with a view to the company obtaining relief over against them in the event of the company being compelled to make good the money in the first instance, and a demurrer by the executors was overruled with costs, on the ground that the company were entitled to a remedy over against them for the amount overpaid them, and on the additional ground that the bill alleged all facts necessary to entitle the plaintiffs to a direct decree against them, although the bill was not framed with a view to a direct remedy against

the executors; for "the payment being made by the company to the executors * * * of money, to a proportion of which the plaintiffs were entitled, and the payment being made without the authority of the plaintiffs it became money had and received by the executors to the use of the plaintiffs." *Ouston v. The Grand Trunk R. W. Co.*, 28 Chy. 431.

The bill shewed that the testator had appointed four executors, three of whom died, but stated that those so dying had never received any portion of the assets. In a suit for the administration of the estate, a demurrer *ore tenus* on the ground that the representatives of such deceased executors should be parties, was overruled with costs. *Webster et al. v. Leys et al.*, 28 Chy. 471.

The bill for the administration of the estate of G. E. alleged that G. had appointed his brother J. E. his executor, and devised to him all his estate upon trust for the benefit of the testator's wife and children as to J. would seem best; the will giving J. power to sell the realty. J. E. proved the will of G., and shortly after his death made his own will by which he purported to dispose of G's estate, the validity of which the bill impugned, and C. S. D., a married daughter of G., was made a defendant, the bill alleging her to be the wife of S. H. D. J. E. made an appointment under G's will, whereby C. S. D. became entitled to a portion of the estate. The defendant demurred on the ground that S. H. D. should have been a party:—Held, that the interest of C. S. D. was merely a chose in action not reduced into possession by her husband, in respect of which she might be sued as a feme sole, and therefore the demurrer was overruled with costs, following *Lawson v. Laidlaw*, 3 A. R. 77. *Siveuright v. Lees*, 28 Chy. 498.

The bill in this case distinctly charged that the defendant had misapplied the moneys of the estate of G. mixing them with his own, and employing them for his own purposes, a demurrer *ore tenus* that G's estate was not properly represented, on the ground that one executor could not represent the estates of both G. and J. was also overruled with costs; for although during the progress of the cause it might become necessary to have different persons represent the two estates that did not constitute a ground of demurrer. *Ib.*

The plaintiff filed his bill against his two brothers seeking administration of his father's estate, of which he alleged they had possessed themselves on his death in 1848. It appeared that the plaintiff attained his majority in 1857, and it was not proved that any fraud or concealment had been practised upon him:—Held, that the suit was improperly constituted, as the fathers' personal representative was not before the court. *Hughes v. Hughes et al.*, 6 A. R. 373.

3. Husband and Wife.

Held, under R. S. O. c. 125, that in an action for a tort committed by a wife during coverture the husband is not a proper party, but the wife must be sued alone. *Amer v. Rogers et ux*, 31 C. P. 195.

In a bill the style of cause named several females as being severally wives of their respective

husbands, but the stating part of the bill did not allege that they were married; a demurrer on the ground that their husbands were not named as parties was overruled with costs. *Webster et al. v. Leys et al.*, 28 Chy. 471.

In application for injunction in respect of wife's property. See *Hathaway v. Doig*, 6 A. R. 264, p. 342.

4. Other Persons.

To an information alleging that the bridge erected by the International Bridge Company constituted a nuisance a railway company who had become lessees of the bridge were held to be proper parties. *The Attorney General v. The International Bridge Co.*, 27 Chy. 37.

The lessees of the road having been made parties to the bill, the Court under the facts stated in the report of this case refused relief against them with costs to be paid by the lessor company. *Cameron v. The Wellington Grey and Bruce W. Co.*, and *The Great Western R. W. Co.*, 27 R. Chy. 95.

The rule of equity is, that if any person not made a party to the suit be a necessary party in respect of any part of the relief prayed by the bill, it is ground of demurrer. Where, therefore, a bill was filed against the Dominion Telegraph Co., seeking to restrain that company from carrying out an agreement for the transfer of telegraphic messages to the American Union Telegraph Company, on the ground that such agreement was in contravention of an agreement previously entered into between the plaintiff and defendant companies for mutual exclusive connections and exchange of telegraphic business, without making the American Union Company a party, a demurrer for want of parties on that account was allowed, with costs. *Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co.* 27 Chy. 592.

In a suit to set aside the nomination by the defendants of an arbitrator on behalf of the plaintiffs for irregularity in such nomination:—Held, that the arbitrators being necessary parties and the defendants resident in this country, the arbitrators, though resident out of the jurisdiction, were properly made defendants to the bill. *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Chy. 648.

A demurrer to a bill filed by shareholders of an incorporated company on behalf of themselves and all other shareholders except the defendants, in which the company were joined as co-plaintiffs, attacking a transaction whereby all the shareholders, including some of those whom the plaintiffs assumed to represent, received shares in the transaction sought to be impeached, was allowed. *The City Light and Heating Co. of London et al. v. Macfie et al.*, 28 Chy. 363.

To a bill by a rural school section corporation to compel the municipality to make good money paid by the municipality to a person alleged not to be the duly appointed officer of the corporation, the treasurer of the municipality is not a proper party. *School Trustees of the Township of Hamilton v. Neil*, 28 Chy. 408.

Where proceedings were taken against sureties without joining their principal :—Held, that the plaintiffs could not proceed against the sureties alone if they required the joinder of the principal in order that they might have their remedy over against him. *Exchange Bank v. Springer ; Same Plaintiffs v. Barnes*, 29 Chy. 270.

Where a bill was filed by a creditor to vacate a deed of composition and discharge, where the discharge had been obtained by a fraudulent concealment of assets :—Held, that the assignee in insolvency was not a necessary party. *McGee v. Campbell et al*, 2 O. R., Chy. D. 130.

See *McLean v. Bruce*, 29 Chy. 507, p. 624.

III. ANSWER.

1. Supplemental Answer.

The bill alleged that defendant had given the plaintiff certain notes on account of the purchase money of a vessel, and a mortgage on the vessel as collateral security. Defendant's answer filed in November, admitted this allegation, which was denied by his co-defendant. In March he applied for leave to file a supplemental answer, withdrawing his admission, and setting up that the notes were given for plaintiff's accommodation, and denying the allegation as to the mortgage. His affidavit stated that he had forgotten the facts, which occurred some years since, when he swore to his answer, and he only remembered them on having a conversation with his co-defendant. The application was refused. *Wright v. Way*, 8 P. R. 326—Taylor, Referee.—Blake.

A decree which had been made against several defendants, one of them, A., being administrator ad litem of a defendant who had died before answer was vacated as to defendant B. and leave given him to file a supplemental answer and have a new hearing of the cause. Subsequently C. who had since the decree and before the appeal been appointed administrator in place of A. who died after decree, applied for leave to file an answer setting up defences which his predecessor had omitted. It was shewn that he had been appointed pro forma to represent the estate ; that no proceedings in appeal had been served upon him, and that no further relief was sought against the estate. The referee granted the leave asked :—Held, affirming the order of Proudfoot, V. C., that the vacation of the decree against B. did not, under the circumstances, open up the decree as against the deceased defendant's estate, and that the referee had, therefore, no power to allow C. to file a supplemental answer. *Peterkin v. McFarlane et al*, 6 A. R. 254.

IV. DEMURRER.

1. For want of Equity.

Where certain shareholders in a company joined with the company as plaintiffs as a precautionary measure merely in case it should transpire that their co-plaintiffs, the company, were not entitled or were unwilling to sue, the court (Blake, V.C.), refused to allow a demurrer for want of equity, as the objection was purely of a formal nature. *The City Light and Heating Co. of London et al. v. Macfie et al.*, 28 Chy. 363.

The plaintiffs A. and J. filed a bill for the purpose of having a deed made to the defendant by J. declared void, as having been obtained by fraud and misrepresentation. The bill alleged that J. had subsequently made a deed of the same property to A., for the purpose of remedying, as far as he could, the wrong he had done by conveying to the defendant, the bill alleging that such deed to A. was made to him "as trustee for the heirs of A. M.," who had died seized. The bill in no place alleged that A. was trustee, but in the following paragraph it was stated that "before the execution of such last mentioned deed the heirs of the said A. M., who are the rightful owners of the said land," &c. :—Held, that notwithstanding the absence of any express allegation of A. being such trustee, sufficient was stated to shew that he had accepted the office of trustee, and as such was entitled to litigate the subject matters of the bill, and a demurrer for want of equity was overruled with costs. A demurrer ore tenus for misjoinder of plaintiffs, it appearing by the bill that J. had no interest in the question raised, was allowed, without costs. *Roche v. Jordan*, 20 Chy. 573, followed. *McLean v. Bruce*, 29 Chy. 507.

See *The Attorney-General v. The International Bridge Co.*, 27 Chy. 37, p. 342.

2. Other Cases.

On the argument of a demurrer any document referred to must be taken to be truly stated, and cannot be looked at to contradict or alter the averments in the pleading, even though there is a reference to the instrument for greater certainty as to its contents. *Loughead v. Stubbs*, 27 Chy. 387.

The defendants set up by way of defence and as a ground of demurrer to the plaintiffs' bill, to restrain proceedings by the alleged arbitrators, the pendency of another action in New York for the same purpose ; but—Held, that this could only form a ground for application to stay proceedings, or to compel the plaintiffs to elect between the two tribunals ; and, Semble, that under the circumstances set out in the report of the case, it could not be taken advantage of in any way. *The Direct United States Cable Co. (Limited) v. The Dominion Telegraph Co. of Canada*, 8 A. R. 416 ; 28 Chy. 648.

A bill alleged that a mortgage was executed by W. to the defendant in consideration of \$450 ; that the defendant advanced only \$150 thereon, and W. being entitled to receive the balance assigned such right and conveyed his equity of redemption to the plaintiffs, that the defendant refused to pay the balance, and claimed to hold the mortgage as security for \$450. The prayer was for specific performance or in the alternative a declaration of the above facts and for general relief. At the hearing the learned judge allowed a demurrer ore tenus on the ground that an agreement to lend money could not be specifically performed :—Held, reversing this judgment that upon the facts alleged in the bill, namely, that the mortgage was being held for more than had been advanced thereon, and therefore to that extent formed a cloud on the title the plaintiff would be entitled to a declaration to that effect.

and appropriate relief, and as the demurrer admitted the truth of the allegation it should have been overruled. *Calvert v. Burnham*, 6 A. R. 620.

See *Siveright v. Leys*, 28 Chy. 498, p. 621; *Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co.*, 27 Chy. 592, p. 622.

V. AMENDMENT.

1. By Adding Parties.

(a) In Master's Office.

Certain machinery was placed in a factory on the premises in question, some before and some after the execution of the mortgage to the plaintiffs in 1874. The mortgagor, the defendant, had no interest in any of the machinery at the date of the mortgage to the plaintiff, having previously sold out to one Abel, but afterwards he became solely entitled to all of it, and he then executed a chattel mortgage of the same to the Parry Sound Lumber Company. On the reference under the decree obtained by the plaintiffs the master made the lumber company parties as subsequent encumbrancers:—Held (assuming the machinery or some portions of it to be trade fixtures removable as between landlord and tenant) that the machinery (or such portions aforesaid) when acquired by the mortgagor, would go to increase the plaintiff's security and that therefore the master was right in making the lumber company parties as subsequent encumbrancers. *London and Canadian Loan &c. Co. v. Pulford*, 8 P. R. 150.—Proudfoot.

In proceeding upon a reference under a decree, the master cannot under the General Orders 244, 245, order a person to be made a party to the suit against whom any relief is sought; and where in proceeding under a decree for the administration of a testator's estate, the master directed one D., who had been in partnership with the testator up to the time of his death, to be made a party, and requiring him with the executors to bring in under oath an account of the partnership dealings, against which D. appealed, the court (Proudfoot, V. C.)—Held the object of making D. a party was for the purpose either of relief or discovery, and in either view the plaintiff could not obtain it in this mode of proceeding, as D., so far as discovery was concerned, could only be regarded as a witness. *Hopper v. Harrison*, 23 Chy. 22.

See *Hill v. Merchants and Manufacturers Ins. Co.*, 28 Chy. 560, p. 373; *Duff v. The Canadian Mutual Ins. Co.*, 6 A. R. 238, p. 373.

2. Other Cases.

Although according to the ruling in *Adamson v. Adamson*, 25 Chy. 552 a plaintiff will not be allowed to amend so as to set up a title acquired after the filing of the bill, yet where by error in the conveyance the west instead of the east half of the lot was conveyed, it would seem (per Proudfoot, V. C.) that it would not be any infringement of that rule to allow an amendment setting up the fact that since the filing of the bill the error had been corrected by a new con-

veyance, and making the necessary amendments in the bill in accordance therewith. *Dumble v. Larush*, 27 Chy. 187.

The proposed amendments of the bill were set out substantially in the order for the injunction, which was served:—Held, that, as the defendant had thereby notice of the proposed amendments, the objection that the amended bill had not been served was not entitled to prevail. *Taylor v. Hall*, 29 Chy. 101.

POLICE.

See COMMISSIONERS OF POLICE.

POLICY.

I. OF INSURANCE—See INSURANCE.

II. VALIDITY OF CONTRACTS WITH REGARD TO PUBLIC POLICY—See CONTRACT.

POSSESSION.

I. ON TRANSFER OF CHATTELS—See BILLS OF SALE AND CHATTEL MORTGAGES.

II. TITLE BY—See LIMITATION OF ACTIONS AND SUITS.

III. UNDER CONTRACT FOR PURCHASE OF LAND—See SALE OF LAND.

IV. TITLE AND POSSESSION—See REPLEVIN—TRESPASS.

POST OFFICE.

The condition of a bond given by the defendants, as sureties for a postmaster, to the postmaster-general, was, that the postmaster "do not and shall not commit any theft, larceny, robbery or embezzlement of, or lose or destroy, or commit any malfeasance, misfeasance, or neglect of duty, from which may arise any theft, larceny, robbery, or embezzlement, loss or destruction of, any money, goods, chattels, valuables, or effects, or of any letter or parcel containing the same which may come into his custody or possession, as such postmaster," &c. The postmaster opened several letters which came into his possession as such postmaster, and having taken therefrom certain cheques, forged the payees' names as endorsers thereof, and got them cashed by a bank upon guaranteeing the genuineness of such endorsements. The drawers refused to recognize these cheques, but issued duplicates to the payees and paid them, so that the bank lost the money. In an action by the postmaster-general on the bond, on behalf of the bank, to recover from defendants, as such sureties, the loss so incurred:—Held, referring to secs. 37 and 78 of the Post office Act of 1875, that defendants were not liable, for that the forgery and the postmaster's guarantee, and not the larceny, were the proximate causes of the loss, and the contents of the letters did not belong to the bank. Remarks as to form of the condition. *Postmaster-General v. McColl et al.*, 31 C.P. 364.

POUNDAGE.

See SHERIFF.

POUND-KEEPER.

IMPOUNDING ANIMALS—See DISTRESS.

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PRACTICE AT LAW.

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(Since the Judicature Act, 1881.)

I. GENERALLY.

Where in matters of practice there was a conflict between common law and equity as to matters not provided for by the Judicature Act, the practice which is most convenient is to be followed. Sec. 19, sub-sec. 10 relates to matters of substantive law, not of mere practice. *Friendly v. Carter*, 9 P. R. 41.—Dalton, *Master*.—Osler.

Although the decree was pronounced before the Judicature Act, and might have been reheard under the former practice, yet the cause not having been set down to be reheard before the coming into force of the Act, it could not under the provisions of the Act respecting pending business, be reheard. *Trude v. Phoenix Ins. Co.*, 29 Chy. 426.

The policy of the O. J. Act is to decentralize business, and send local matters to local masters. *Aiken v. Wilson*, 9 P. R. 75.—Boyd.

II. WRITS.

1. Endorsement.

The writ was endorsed for the price of land which the plaintiff had agreed to sell to the defendant. A motion for judgment under Rule 80, O. J. Act, was refused. Such a claim cannot be specially endorsed. *Hood v. Martin*, 9 P. R. 313.—Dalton, *Master*.

See *Lucas v. Ross*, 9 P. R. 251 p. 392; *Imperial Bank v. Britton*, 9 P. R. 274, p. 392.

2. Renewal.

A writ of summons, dated the 17th April, 1879, was after several renewals finally renewed on the 6th April, 1881, and served on the 27th December, 1881:—Held, that no declaration having been delivered, the case was governed by the O. J. Act (Rule 493,) and that by Rule 31, the writ continued in force for one year from the date of the last renewal, and service on the 27th December, 1881, was therefore good. *Mackelcan v. Becket*, 9 P. R. 289.—Dalton, *Master*.

3. Service.

(a) Substitutional Service.

Where a judgment debtor had absconded, and his place of abode could not be ascertained, substitutional service upon him of a summons to set aside fraudulent conveyances made by him, was allowed. *Dobson v. Marshall*, 9 P. R. 1.—Osler.

The plaintiff had some years previously in an action of ejectment against these defendants served them personally, and they had defended by the same solicitor. It was shewn that one defendant, the father of the other two who resided in the U. S. A. corresponded with them. An application under Rule 4, O. J. Act, for an

order permitting substitutional service on the father for the other two defendants, was refused, it not being shewn that prompt personal service could not be effected. *Robertson v. Mero et al*, 9 P. R. 510.—Dalton, *Master*.—Boyd.

See *Weatherhead v. Weatherhead*, 9 P. R. 96, p. 578.

(b) Service Abroad.

Where a defendant has been served out of the jurisdiction, and the service is allowed, but the defendant does not appear, no order to proceed is necessary. Division (e), Rule 45 is not to be extended to all the cases under the rule. *Martin v. Lafferty*, 9 P. R. 300.—Dalton, *Master*.—Proudfoot.

Service of process on infant out of jurisdiction. See *Rew v. Anthony*, 9 P. R. 545, p. 336.

Quære, whether the personal service referred to in R.S.O. c. 50, s. 145 refers to personal service in Quebec. *Court v. Scott*, 32 C. P. 148.

(c). Other Cases.

Blakeslee, Brown & O. carried on business in partnership under the name of Blakeslee & Co., Blakeslee absconded on the 19th September, and the business continued. O. assigned his interest to Brown, and after such assignment, but before it had been made public, the plaintiff served his writ of summons against the firm on O:—Held, that the service was good. *Bank of Hamilton v. Blakeslee et al*, 9 P. R. 130.—Dalton, *Master*.

Service requisite to make judgment recovered in Quebec conclusive under R. S. O. c. 50, s. 145. See *Court v. Scott*, 32 C. P. 148.

III. CONSOLIDATING ACTIONS.

The defendant applied to have this action consolidated with an action brought by the defendant in the Chancery Division against these plaintiffs, on the ground that the plaintiffs' counter claim in the Chancery Division action disclosed the same cause of action as shewn in the statement of claim in this action. The action in the Chancery Division was commenced on the 17th May, 1882, and this action on the 10th June, 1882:—Held, that though the case presented was not technically within the terms of Rule 395, O. J. Act, there is an inherent right in the court to prevent an undue use of its process, and this action was stayed until that in the Chancery Division was determined, no special reason to the contrary being shewn by the plaintiffs. *Taylor et al. v. Bradford*, 9 P. R. 350.—Cameron.

An application to consolidate two motions for administration and partition pending before a local master should be made to him and not to a judge in chambers. *Lambier v. Lambier*, 9 P. R. 422.—Boyd.

IV. JUDGE AND MASTER IN CHAMBERS.

1. Jurisdiction.

A judge sitting in chambers has no jurisdiction to order judgment to be signed under Rule 324

(a), but a motion for judgment thereunder must be made to the court. *Morrison v. Taylor*, 46 Q. B. 492.

The master has authority to take the account with rests, under the ordinary reference, as against an executor, but where he declines to charge the executor in this way, if it is intended to appeal, he should be required to report the facts to enable the court to determine on the propriety of his decision. Quære, whether it is not the more proper course to bring the matter up on further directions with all the materials for consideration spread out on the report, rather than to appeal in such a case. *Sievewright et al. v. Leys*, 1 O. R., Chy. D. 375.

Jurisdiction of master in chambers over only part of subject matter. See *Re Devitt*, 9 P. R. 110.—Proudfoot.

On motion for an order for the committal of a defendant for non production of documents under Rule 420, O. J. Act, which vests in the master in chambers the powers of the referee in chambers, the master—Held that matters relating to the liberty of the subject having been excepted from the jurisdiction of the clerk of the crown and pleas under the former practice, are still beyond his jurisdiction by Rule 420, O. J. Act. *Keefe v. Ward*, 9 P. R. 220.—Dalton, Master.

The master in chambers has no jurisdiction to entertain an application for costs under Rule 264. *Hopkins v. Smith*, 9 P. R. 285.—Dalton, Master.

The master's discretion exercised under R. S. O. c. 39, s. 29 and Rule 420, O. J. Act, is open to review by an appeal to a judge in chambers under Rule 427, O. J. Act. See *Christie v. Conway et al.*, 9 P. R. 529 p. 390.

See *Re Curry*, *Wright v. Curry—Curry v. Curry*, 8 P. R. 340, p. 589; *Grand Trunk R. W. Co. v. Ontario and Quebec R. W. Co.*, 9 P. R. 420; *infra*; *Ryan v. Fish et al.*, 9 P. R. 458, p. 227; *Thurlow v. Beck*, 9 P. R. 268, p. 399.

2. Appeal from.

Held that appeals from the Master in Chambers are governed by Rule 427 and not by Rule 414, which applies to appeals to a divisional court. *Lowson v. The Canada Farmers Ins. Co.*, 9 P. R. 185.—Dalton, Master.—Boyd.

An appeal was not made within the time required by Rule 461, O. J. Act, as it was supposed that Christmas vacation did not count. On the facts stated in the judgment leave was given to appeal on payment of costs. *Sievewright v. Leys*, 9 P. R. 200.—Dalton, Master.

A stay of proceedings will not be granted pending an appeal unless security is given for the costs of appeal, as well as those in the court below. Application for a stay should not be made ex parte. Where a stay was granted on an ex parte application, it was held that an appeal might be had direct to a judge in chambers, without applying to the Master to rescind his order. *Grand Trunk R. W. Co. v. Ontario and Quebec R. W. Co.*, 9 P. R. 420.—Proudfoot.

Where an appeal had been made at the first sitting of the court:—Held, not too late under Rule

414 though more than eight days had elapsed and the time had not been extended. *Hewson v. Macdonald*, 32 C. P. 407.

V. REFEREES.

1. Appeal from.

The eight days for appealing from an order of the referee under Rule 427 (c), of the O. J. Act, count from the making of the decision, not from the entry of the order, as formerly. Where the plaintiff's solicitors, owing to a misapprehension on this point, allowed the eight days to elapse, Proudfoot, J., granted further time. *Dayer v. Robertson*, 9 P. R. 78.

Where an application for a commission to examine a witness in New York, was made before an official referee, and referred by him to a judge, it was—Held that matters coming within the jurisdiction of any officer of the Court should be disposed of by him in the usual way, and the parties might then appeal from such decision. *Hughes v. Rees*, 9 P. R. 86.—Boyd.

An order extending the time for appealing from the report of an official referee under sec. 47, O. J. Act, should not be made ex parte. *Hamilton v. Tweed*, 9 P. R. 448.—Proudfoot.

VI. PROCEEDINGS IN MASTER'S OFFICE.

The circumstances under which interest on a claim ought to be allowed or refused in the master's office, considered and acted on. *Re Ross*, 29 Chy. 385.

Where an amendment in a matter of account, as stated in the pleadings, would be allowed before decree, a similar amendment should also be allowed, if asked for, in respect of the accounts filed, after decree, in the master's office. *Court v. Holland et al.*, 4 O. R., Chy. D. 688.

VII. NOTICE OF MOTION.

Irregularities relied on, need not be stated in a notice of motion if they are set out in affidavits, filed on the motion, and referred to in the notice. *Blain v. Blain et al.*, 9 P. R. 269.—Dalton, Master.

VIII. SERVICE OF PAPERS.

Service of bill in partition suit on infant. See *Weatherhead v. Weatherhead*, 9 P. R. 96.

Plaintiff's and defendant's attorneys had an arrangement between themselves by which papers in the suit should be sent by mail. The notice of trial was posted the day before the last for giving notice, but reached defendant's attorney one day too late. It was shewn that the practice of both attorneys had been to admit service as of the day of receipt:—Held, that the notice of trial must be set aside. *Robson v. Arbuthnot*, 3 P. R. 313, distinguished. *McDonough v. Alison*, 9 P. R. 4.—Dalton, Master.

A person of the same name as the defendant served by mistake with the writ in the action was—Held entitled to his costs of opposing a motion for judgment under Rule 324 O. J. Act. *Lucas v. Fraser*, 9 P. R. 319.—Dalton, Master.

IX. TRANSFERRING CAUSE FROM ONE DIVISION OF THE HIGH COURT TO ANOTHER DIVISION.

Where a plaintiff brings an action in the Chancery Division which is proper to be brought there, he will not be allowed to transfer either on the ground that he wishes it tried by a jury, or that a transfer would expedite the trial. *Vermilyea v. Guthrie*, 9 P. R. 267.—Boyd.

The action was transferred from the Chancery Division to the Common Pleas Division by an order of the judges, but the plaintiff not having notice of the transfer signed judgment in the Chancery Division. An order was made retransferring the case to the Chancery Division, and allowing the judgment entered to stand and be in force from its entry, without costs. *Patterson v. Murphy*, 9 P. R. 306.—Dalton, Master.

X. TERM'S NOTICE.

Where neither party has taken any proceeding in a suit for a year a term's notice to proceed, which was required under the Common Law practice, is not necessary under the O. J. Act. *Beaver v. Boardman*, 9 P. R. 239.—Dalton, Master.—Armour.

XI. DISMISSING ACTION FOR WANT OF PROSECUTION.

Issue was joined on the 16th December, 1880, and on the 22nd the cause was tried, and a nonsuit entered, which by consent was set aside, and the case again entered for trial at the sittings held in March, 1881, but remained over until the following sittings, when it was struck out by consent. After the Judicature Act came into force, a motion to dismiss for want of prosecution was made, and the plaintiffs' solicitors, though alleging that they did not intend to proceed, would not consent to the dismissal of the action. The master in chambers dismissed the action with costs, and this order was reversed by Cameron, J.:—Held, on appeal to the Common Pleas Division, reversing the order of Cameron, J., that the master's order was right; that the words in Rule 255 "for the next sittings of the court," were not confined to the first sitting after issue joined; and that the fact that the plaintiff had already taken the cause down to trial did not prevent the defendant from moving to dismiss for not going to trial again. *Chapman et al. v. Smith*, 32 C. P. 555.

An undertaking to speed the action is not in all cases a sufficient answer to a motion to dismiss under Rule 255, O. J. Act. By G. O. C. 276 a judge had discretion under all the circumstances of the cause to dismiss or not, and the practice not being interfered with remains as before the O. J. Act, by ss. 12 and 52 of the Act. Under the circumstances of this case an order to dismiss was rescinded. *Bucke v. Murray*, 9 P. R. 495.—Proudfoot.

XII. STAYING AND SETTING ASIDE PROCEEDINGS.

An order directed the trial of an issue in an interpleader matter. The plaintiff served the issue but did not serve with it a jury notice as required by R. S. O., c. 54, s. 4. He subse-

quently served a jury notice with the notice of trial. The defendant did not appear at the trial, and a verdict was rendered for the plaintiff, who afterwards obtained (on notice), an order in Chambers for costs:—Held, on appeal, affirming this order, that the verdict obtained on the trial by a jury was not a nullity, but only irregular, and not being moved against promptly should stand. *Leeson v. Lemon*, 9 P. R. 103.—Boyd.

As to effect of obtaining order to postpone trial. See *Allen v. Mathers*, 9 P. R. 477.

See *Taylor et al. v. Bradford*, 9 P. R. 350, p. 630; *Grand Trunk R. W. Co. v. Ontario and Quebec R. W. Co.* 9 P. R. 420, p. 631; *Hewson v. MacDonald*, 32 C. P. 407.

XIII. VARYING MINUTES.

On a motion to vary minutes, nothing can be done at variance with the order as granted, but additions or variations may be made so as to carry out the intention of the court in pronouncing it. *Hendrie v. Beatty*, 29 Chy. 423.

(Before the Judicature Act, 1881.)

PRACTICE AT LAW.

I. WRIT OF SUMMONS.

1. Service.

(a) On Foreign Corporations.

The defendants were a foreign insurance company doing business in Ontario, and having a head office for this province at Toronto. The writ of summons was served on the local agent of the defendants' company at Ottawa:—Held, that the service was good. *Wilson v. Aetna Life Ins. Co.*, 8 P. R. 131.—Dalton, Q. C.

(b) Absconding Debtor.

The writ of summons in ejectment was served upon the defendant's wife after he had left the country. An order to sign judgment against the husband was granted in default of appearance. *Trust and Loan Co. v. Jones*, 8 P. R. 65.—Dalton, Q. C.

(c) Service Abroad.

A copy of a writ of summons, instead of a notice thereof, had been served upon a defendant, not a British subject, outside of Ontario:—Held, that this was an irregularity which could not be amended, and that the copy and service of the writ should be set aside. *Henderson v. Hall*, 8 P. R. 353.—Cameron.

2. Special Endorsement.

The particulars of claim upon a writ of summons specially endorsed to which the defendant appears do not bind the plaintiff as particulars under a declaration on the common counts, and in such a case, he must comply with a demand for particulars made by the defendant. *Huggins v. Guelph Barrel Co.*, 8 P. R. 170.—Dalton, Q. C.

II. CLERK OF THE CROWN AND PLEAS.

1. Jurisdiction.

Held, that it is within the power of the clerk of the crown in chambers to make an order for the payment of a weekly allowance to a debtor, under the Indigent Debtors Act, (R. S. O. c. 69,) where it can legally be made. *Wheatly v. Sharp*, 8 P. R. 189.—Cameron.

2. Appeal from.

Semble, that a judge has power to extend the time for appealing against the order of the clerk of the crown in chambers on an application for an allowance under the Indigent Debtors Act, (R. S. O., c. 69,) made after four days from the making of the order. *Wheatly v. Sharp*, 8 P. R. 189.—Cameron.

Held, that there is no appeal to the full court in term from an order of the clerk of the crown and pleas, made on an application to change the venue in county court cases under R. S. O. c. 50, s. 155; but the only appeal in such cases is to a judge in chambers, under sec. 31 of the Act:—Held, however, that if an appeal did lie to the full court, it might be made direct thereto, without first going before a judge in chambers. *Mahon et al. v. Nicholls*, 31 C. P. 22.

III. ORDERS.

Held, where an order directing a reference to the master has been made in chambers to determine the amount due from an attorney to his client, and the reference completed under it, an application for relief therefrom must be made to the court. *In re Attorney*, 8 P. R. 102.—Osler.—Full Court of Common Pleas.

IV. RULES.

Leave was granted, notwithstanding the lapse of two terms, to rehear a rule made absolute setting aside a by-law, on no cause being shewn. *Re Chamberlain and the Corporation of the United Counties of Stormont, Dundas, and Glen-garry*, 45 Q. B. 26.

See *McCarthy v. Arbuckle*, 31 C. P. 48, p. 617.

V. SERVICE OF PAPERS.

Held, that service on the defendant's attorney at his house at 9.30 p.m. on Saturday of an order and appointment to examine the defendant at 2 p.m. on the following Tuesday, was irregular, the notice not being sufficient:—Held, also, that Rule of court 135, applies to the service of orders and appointments to examine, and that this service must be treated as if made on the following Monday. *Senn v. Hewitt*, 8 P. R. 70.—Q. B.

Service by mailing. See *McDonough v. Alison*, 9 P. R. 4, p. 632.

VI. TERM'S NOTICE.

Where no proceeding has been taken in the cause for a year subsequent to issue being joined,

the plaintiff must give a term's notice of his intention to serve notice of trial. *McCleary v. Morrow*, 8 P. R. 12.—Dalton, Q. C.

Where a summons was enlarged sine die by the consent of counsel and nothing further was done in the suit for more than a year:—Held, that a term's notice of the plaintiff's intention to proceed was necessary, before he could make any motion in the cause. *Bank of Montreal v. Foulds et al.*, 8 P. R. 182.—Dalton, Q. C.

Issuing a side-bar rule to discontinue the action is not a proceeding within the meaning of the rule which requires a term's notice of plaintiff's intention to proceed, where no proceeding has been taken in the cause for a year. *S. C.*, *Id.* 236.—Osler.

VII. SETTING ASIDE OR STAYING PROCEEDINGS

1. Delay in Moving.

Defendant precluded both by delay and acceptance of service of the writ from moving to set aside proceedings. See *Regina v. Stewart*, 8 P. R. 297, p. 2.—Osler.

2. Staying Proceedings on Equitable Grounds.

See *Bates et al. v. Mackey*, 1 O. R. 34.

3. Other Cases.

A summons to dismiss an action for breach of an order to examine, generally implies a stay of proceedings; but where the judge who granted the summons struck out the part relating to a stay, and the summons was afterwards enlarged without any mention of a stay, a notice of trial served while the summons was pending, was held to be regular. *Merchants Bank v. Pierson*, 8 P. R. 129.—Dalton, Q. C.

After issue joined one of two plaintiffs gave to the defendant a release under seal of all actions and demands. The defendant thereupon moved to stay all proceedings in the suit:—Held, that the defendant should plead the release, and that he was not entitled to a stay of proceedings, and the remaining plaintiff was allowed to strike out the name of the other plaintiff. *McAlpine et al. v. Carling*, 8 P. R. 171.—Osler.

(Before the Judicature Act, 1881.)

PRACTICE IN EQUITY.

I. BILLS.

1. Dismissing for want of Prosecution.

In a suit to set aside a conveyance of the equity of redemption in certain lands as fraudulent as against creditors, one sitting of the court having been lost, a defendant, the grantee of the equity of redemption, moved to dismiss the bill for want of prosecution. More than two weeks before the sittings commenced, the plaintiff's solicitors were notified to file a replication and proceed to a hearing, but did not do so. The excuses offered by the plaintiff were, that the

defendant was a material witness, and was absent prior to the hearing, and that the property had been sold under a power of sale contained in one of the mortgages, and little or no surplus remained after paying the mortgages. It appeared that no effort had been made to find the defendant in order to subpoena him as a witness at the hearing, and that the sale of the land did not take place until a month after the sittings at which the cause might have been heard:—Held, that the delay was not excused, and the bill should be dismissed:—Held also, that the failure of the defendant to comply with an order to produce did not, under the circumstances of the case, deprive him of the right to move to dismiss. *Elliott v. Gardner*, 8 P.R. 409.—Stephens, Referee.—Proudfoot.

Semble, that a plaintiff cannot, in answer to a motion to dismiss, ask to have the bill dismissed without costs, but must make a substantive motion for that purpose. *Id.*

2. Undertaking to Speed.

The plaintiff undertook, upon a motion to dismiss his bill, to bring the cause down at the then next sittings at Guelph. From some correspondence it appeared that if the plaintiff had set the cause down for the then next Guelph sittings, a postponement would have been asked for and granted, on the ground of the attendance at the House of Commons of a member who was a defendant. The plaintiff offered to bring the cause down to the then next sittings at Toronto, to which a conditional consent was given; but the cause was not set down. The referee dismissed the bill:—Held, on appeal, reversing the referee's decision, that under the circumstances, more fully set out in the case, the plaintiff was relieved from his undertaking to bring the cause down to Guelph, and that he was under no obligation to bring the cause down to Toronto; and as no intentional delay was shewn on the part of the plaintiff, the bill was restored. *Petrie v. Guelph Lumber Co.*, 9 P. R. 52.—Ferguson.

II. NEW HEARING.

A defendant knew precisely the question to be tried at the hearing, but took no steps to adduce any evidence on his behalf, and a witness, whom he would have called, was called by the plaintiff, and gave evidence which the defendant swore was different from what he had anticipated he would give:—Held that this was not such a case of surprise, as entitled the defendant to have the cause reopened, in order that there might be a new hearing, and a motion made for that purpose was refused with costs, although the defendant swore that the evidence given by the witness had taken him by surprise, and that the same was incorrect, and would be contradicted by the wife and son of the defendant. *Sherritt v. Beattie*, 27 Chy. 492.

III. DECREE.

1. Amendment of.

By the decree an assignment of a bond was declared to have been by way of security only;

and further, that the plaintiff was entitled to certain credits, and referred it to the master to take the accounts. In proceeding with the accounts the defendant was hampered by this declaration in the decree, as the master felt bound by it, whereupon the defendant moved upon petition to amend the decree so as to make it conform to the judgment: Ferguson J., before whom the motion was heard, being of opinion that the judgment was directed solely to the fact that the bond was assigned as a security only, and that the view taken as to the credits was a ground for so holding, and was not a substantive part of the judgment, and therefore that the declaration as to the credits was unauthorized, ordered the same to be struck out of the decree upon payment of costs of the application and of all additional costs incurred or to be incurred in the master's office, caused by the decree not having been properly drawn in the first instance. *Livingston v. Wood*, 29 Chy. 157.

2. Review.

In applications to open up proceedings by way of review on the ground of newly discovered evidence, it is necessary for the party applying to establish, (1) that the evidence is such that if it had been brought forward at the proper time it might probably have changed the result; (2) that at the time he might have so used it neither he nor his agents had knowledge of it; (3) that it could not with reasonable diligence have been discovered in time to have been so used; and (4) the applicant must have used reasonable diligence after the discovery of the new evidence. Where, therefore, a railway company in the construction of their road took possession of and built their road across a plot of land of the plaintiff, who instituted proceedings to compel payment therefor, and under the decree a sum of \$1,800 was found to be the value of such plot, which sum, together with interest and costs, was paid by the company in order to prevent the land being purchased by a rival company; and three years afterwards they applied on petition to have a portion of such purchase money refunded, on the ground that another railway company, whose rights had been assigned to them, had previously paid a prior owner of the land for a portion thereof: The court [Ferguson, J.] refused the relief asked with costs, on the ground, amongst others, that the company, had they exercised due diligence in the matter, might have become aware of such prior purchase and payment. *Dumble v. The Cobourg and Peterborough Ry. Co.*, 29 Chy. 121.

3. Other Cases.

The court will not assist in carrying on or perpetuating error, by enforcing an erroneous decree. *Mitchell v. Strathy*, 28 Chy. 80.

A decree had been made on consent, referring to the master the question whether or not the defendant had performed certain work for the plaintiff at a specified rate, who reported that he had not. On appeal, the court (Blake, V.C.) considering that this was a question that should have been disposed of by the court, set aside the report and directed a trial to be had upon that issue, reserving the costs of the proceedings be-

fore the master and of the appeal:—Held, on further directions, that these costs having been incurred in a proceeding consented to under a common mistake of parties as to the proper tribunal to decide the question, each party should pay his own costs. *Dalby v. Bell*, 29 Chy. 336.

A decree which had been made against several defendants, one of them A., being administrator ad litem of a defendant who had died before answer, was vacated as to the defendant B., and leave given him to file a supplemental answer and have a new hearing of the cause. Subsequently C., who had, since the decree and before the appeal, been appointed administrator in place of A., who died after decree, applied for leave to file an answer setting up defences which his predecessor had omitted. It was shewn that he had been appointed pro forma to represent the estate; that no proceedings in appeal had been served upon him, and that no further relief was sought against the estate. The referee granted the leave asked:—Held, affirming the order of Proudfoot, V. C., that the vacation of the decree as against B. did not, under the circumstances, open up the decree as against the deceased defendant's estate, and that the referee had, therefore, no power to allow C. to file a supplemental answer. *Peterkin v. McFarlane et al.*, 6 A.R. 254.

IV. MASTER.

1. Reference to and when Ordered.

Where a question is directly raised by the pleadings, and is distinctly presented to the court for its decision, and evidence has been given upon it in order to obtain the judgment of the court, it will not be referred to the master for his decision. *The International Bridge Co. v. The Canada Southern R. W. Co.*, and *The Canada Southern R. W. Co. v. The International Bridge Co.*, 7 A.R. 226; see *S. C.* 8 App. Cas. 723.

See *Williamson v. Erwing*, 27 Chy. 596, p. 127.

2. Changing Reference.

Where the business of the partnership in question in this suit had been carried on in the county of Simcoe, and the parties resided there, and it was found the master in ordinary could not proceed with the reference directed for two months from the date of this application, the reference was changed to Barrie. *Aitken v. Wilson*, 9 P. R. 75.—Boyd.

3. Proceedings in Master's Office.

In proceeding upon a reference under a decree, the master cannot under the General Orders 244, 245, order a person to be made a party to the suit against whom any relief is sought, and where in proceeding under a decree for the administration of a testator's estate, the master directed one D., who had been in partnership with the testator up to the time of his death, to be made a party, and requiring him with the executors to bring in under oath an account of the partnership dealings, against which D. appealed, the court (Proudfoot, V. C.):—Held the object of making D. a party was for the purpose

either of relief or discovery, and in either view the plaintiff could not obtain it in this mode of proceeding, as D., so far as discovery was concerned, could only be regarded as a witness. *Hopper v. Harrison*, 28 Chy. 22.

4. Report.

(a) Confirming.

A report requiring confirmation does not become absolute until thirty days from the making, and fourteen days from the filing thereof have elapsed. *Re Eaton, Byers v. Woodburn*, 8 P. R. 289.—Blake.

Where a decree ordered payment forthwith after the making of a report, an execution issued before the report had been filed, was set aside with costs. Semble, the report did not require confirmation, under the wording of the decree. *Jellett v. Anderson*, 8 P. R. 387.—Stephens, Referee.

(b) Other Cases.

A master's report made during long vacation in contravention of G. O. 425, is as against a defendant having no notice of the proceedings on which the report is founded, entirely null and void. *Fuller v. McLean*, 8 P. R. 549.—Boyd.

After the closing of his report, a master should not certify as to any matters before him in the course of the inquiry upon which he has reported, unless called upon to do so by the court. After report any certificate, unless called for by the court, is irregular and improper. *Rosebatch v. Parry*, 27 Chy. 193.

The master, at the request of the defendant, reported specially in his favour as to many matters not particularly referred to him, but which formed the subject of charges of fraud made in the bill of complaint:—Held, that the master had power to report specially any matters he deemed proper for the information of the court, and that it was his duty to so report any matter bearing on the question of costs. *Hayes v. Hayes*, 29 Chy. 90.

5. Appeal from.

Where a master in his discretion fixes the commission to be allowed to parties under G.O. 643, and settles the disbursements in the suit, there is an appeal to a judge in chambers from his finding. The disbursements should still be submitted to the master in ordinary for revision, like other bills of costs. *Campbell v. Campbell*, 8 P. R. 159.—Blake.

A report must be filed before a notice of appeal from it is given. Semble, that seven clear days' notice of appeal is necessary. *Hayes v. Hayes*, 8 P. R. 546.—Blake.

On a question of rent, there was a conflict of evidence as to the amount thereof. On appeal from the Master's finding:—Held, that the witnesses having been examined before the master, he was a better judge than the court as to the weight to be given to the testimony of the res-

pective witnesses; and the question as to the proper sum to be allowed for rent, was one with which the master was quite as competent to deal, as the court could be. *Little v. Bruncker*, 28 Chy. 191.

Held, that as the matter in question in this case had been referred to the master by the decree, which was for specific performance, it should have been disposed of in his office under G. O. 226. *Stammers v. O'Donohoe*, 29 Chy. 64.

The defendant was the assignee of a policy of assurance on his brother's life, in trust to pay himself certain moneys and expend the residue in the support and maintenance of the assured's family, and having made further advances on the advice of his brother, who was a practising barrister, he took a second assignment of the policy absolute in form. On the death of the assured the defendant, asserting a right to obtain payment of the policy, went to the head office of the company in the United States, in order to hasten the payment, pending a dispute with the plaintiffs—the family of the assured—as to his rights. In taking the accounts between the parties, the master found that the defendant acted bona fide in so doing and allowed his expenses, although the company, at the instance of the plaintiffs, refused to pay him, and sent the proceeds of the policy to their solicitors in Toronto, to be paid over to the party entitled:—Held, on appeal from the master (affirming his ruling), that as the defendant was under either assignment entitled to possession of the fund—either as trustee or individually—and as the master under all the circumstances, thought fit to allow such expenses, and it did not appear clear to the court that such allowance was wrong, the item should be allowed:—Held also, that the master had properly allowed to the defendant in his accounts a fee of \$10 paid by him to counsel for advice as to his action in respect of the two assignments. *Hayes v. Hayes*, 29 Chy. 90.

On an appeal from the master on a question of the weight of evidence, the court, though not satisfied as to what was the actual truth of the case, could not say that the master was wrong, and therefore dismissed the appeal, with costs; liberty being given to the appellant, however, to examine the witnesses again at the next sittings before the learned judge who heard the appeal so as to enable him to dispose of the matter with greater satisfaction to himself, in which case costs would be reserved. *McArthur v. Prittie*, 29 Chy. 500.

V. JUDGE OR REFEREE IN CHAMBERS.

1. Jurisdiction.

A motion made under R. S. O. c. 49, s. 9, to appoint an administrator ad litem of the estate of a deceased person, may be made before the referee, as that section merely extends a jurisdiction already possessed by him under G. O. 56. *Collier v. Swayzie*, 8 P. R. 42.—Stephens, *Referee*.—Spragge.

The referee has no jurisdiction to strike out interrogatories for impertinence. *Williams v. Corby*, 8 P. R. 83.—Stephens, *Referee*.—Proudfoot.

The referee in chambers has no jurisdiction to make an order for payment into court by an executor or administrator of amounts admitted by him to be in his hands. *Re Curry—Wright v. Curry*, *Curry v. Curry*, 8 P. R. 340.—Stephens, *Referee*.

See *In re Selby*, 8 P. R. 342, p. 589; *Peterkin v. McFarlane et al.*, 6 A. R. 254, p. 639.

2. Appeal from.

Where a solicitor's clerk, through forgetfulness, neglected to set down an appeal as required by G. O. 642, the referee refused to extend the time for appealing; and—on appeal, Spragge, C., upheld his ruling. *Dunnard v. McLeod*, 8 P. R. 343.

VI. SERVICE GENERALLY.

1. Of Bills.

(a) Absconding Defendants.

Where a bill had been filed for foreclosure, and the defendant, the official assignee of the mortgagor, absconded before the bill was served an order was granted allowing substitutional service on one of the two inspectors of the insolvent's estate. *London Loan and Agency Co., v. Thompson*, 8 P. R. 91.—Stephens, *Referee*.—Proudfoot.

Where the defendant in a suit had absconded to the United States before the filing of the bill, and two months after the filing of the bill an assignee in insolvency was appointed by the creditors of the defendant, and the assignee was served with the bill, but not within the time limited by the General Orders, the referee in chambers made an order allowing the service as good, though made fourteen months after the bill was filed:—Held, on appeal, affirming the referee's order, that the defendant having absconded was a sufficient reason for not proceeding with greater diligence. *Gederich v. Brodie*, 8 P. R. 486.—Blake.

(b) Service Abroad.

See *Exchange Bank v. Springer*, 29 Chy. 270, p. 240.

(c) By Publication.

Where a defendant is served by publication under G. O. 100, in order that a praecipe decree may be obtained, the notice should contain the special endorsement in schedule G. to Order 436, otherwise the cause must be set down to be heard pro confesso. *Pherrill v. Forbes*, 8 P. R. 408.—Proudfoot.

2. Acceptance of Service.

Notice of examination and hearing was served at a few minutes past four, on the last day for

giving notice, on solicitors of one defendant, who admitted service, but on the same day, discovering that the notice had been served too late, they wrote to the plaintiff's solicitors repudiating their admission, and saying that they would move to set aside the notice. On a motion it was shewn that there was no other service or notice than as above mentioned, and the application was thereupon refused: *Scott v. Burnham*, 3 Chy. Chamb. 402, followed. Semble, that the acceptance of service would not be binding, having been so soon repudiated. *Wright v. Way*, 8 P. R. 328.—*Stephens, Referee*.—*Blake*.

VII. STAYING PROCEEDINGS.

Where a decree had been made declaring the plaintiff to be entitled to insurance moneys, and directing a reference to ascertain the amount and payment forthwith after the making of the report, an order staying proceedings in the master's office was refused pending an appeal from the decree. *Butler v. Standard Fire Ins. Co.*, 8 P. R. 41.—*Stephens, Referee*.

VIII. ABATEMENT OF SUIT.

The suit became abated between the date of the report and the time fixed by it for payment by subsequent incumbancers. On an application for a final order for foreclosure it was refused and a new day was appointed, allowing the incumbancers an additional time for payment equal to the time the suit remained abated. *Biggar v. Way*, 8 P. R. 158.—*Blake*.

PRECEDENCE.

Of Counsel.—See *Lenoir v. Ritchie*, 3 S. C. R. 575, p. 71.

PREMIUM NOTES.

See *INSURANCE*.

PREScription.

See *LIMITATION OF ACTIONS AND SUITS*.

PRESUMPTIONS.

See *EVIDENCE*.

PRINCIPAL AND AGENT.

I. APPOINTMENT OF AGENT.

1. *By Corporations*—See *CORPORATIONS*.

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IV. AGENT TAKING COMMISSION FROM OPPOSITE PARTIES, 645.

V. POWER AND AUTHORITY OF AGENT.

1. *Officers of the Crown*, 646.
2. *Agents of Corporations*, 646.
3. *As to Promissory Notes*, 647.
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VI. RIGHTS OF AGENT AGAINST PRINCIPAL, 648.

VII. LIABILITY OF AGENT TO PRINCIPAL.

1. *Agent Purchasing Property of Principal*, 648.
2. *For Investment of Money*, 649.

VIII. LIABILITY OF PRINCIPAL TO THIRD PERSONS.

1. *For Fraud of Agent*, 649.
2. *Other Cases*, 650.

IX. MISCELLANEOUS CASES, 651.

X. PARTICULAR AGENTS — See THE SEVERAL TITLES.

II. PROOF OF AGENCY.

One C. entered into agreements with several parties to carry freights for them at certain named prices to be paid to the defendant, not mentioning any particular vessels in which the same were to be carried and then agreed with the defendant as part owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon. The defendant and C. both swore that the arrangement had not been made by C. as agent of the defendant, but for his own benefit:—Held, that the fact of the defendant having rendered an account in his own name and also sued for a portion of the freight, though aided by the other circumstances mentioned in the judgment, was not sufficient to counterveil the positive denial of the defendants and C., that the contracts had not been made in behalf of and as agent for the defendant, freight being, *prima facie*, payable to the master of a vessel, and the cargo need not be delivered by him until the freight thereof is paid, although in any other transaction such conduct would have been strong evidence that the defendant was the principal contractor. *Merchants Bank v. Graham*, 27 Chy. 524.

Held, that, if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is or can be, adduced of his appointment. *School Trustees of the Township of Hamilton v. Neil*, 28 Chy. 408.

In an action for the non-delivery of certain groceries sold:—Held, that upon the evidence set out in the report of this case, K., by whom the sale was made, was shewn to be the defendants' agent authorized to sell on their behalf. *Ockley et al. v. Masson et al.*, 6 A. R. 108.

The plaintiffs entered into a contract with one F. to fence an extension of the defendants' railway. F. was a shareholder of the defendants' company, and general manager of that part of the road which was in operation, and was con-

tractor for the construction of the extension. The only writing between the parties was the following informal memorandum, prepared by one of the plaintiffs:—"RENFREW, 6th January, 1876, Memorandum of fencing between Muskrat river east to Renfrew; T. & W. Murray to construct same next spring, for C.C.R.R. Co., to be equal to 5 boards 6 inches wide—posts 7 to 8 feet apart—for \$1.25 per rod. Company to furnish cars to distribute lumber. T. & W. MURRAY, A. B. FOSTER." During the progress of the work F. drew drafts on the company, in favour of the plaintiffs, which were accepted and paid by them. They also allowed the plaintiffs to retain various sums due by them to the company as freight, charging the amounts at stated periods to F. and releasing the plaintiffs, who were in turn charged with the amounts by F. The jury were asked whether the plaintiffs, when they made the agreement, supposed that they were contracting with the company, and were told that, though F. was not the agent of the company to make the contract, yet if he professed to be acting for the company and working in the company's name, it would be binding on the company, unless they repudiated it; and they were asked whether the company had adopted the contract, by paying money or allowing freight:—Held, per Spragge, C. J. O., and Burton, J. A., that there was misdirection, as it was immaterial what the plaintiffs understood if F. had not authority in fact to make the contract; and that there could be no ratification or adoption of the contract by the company, unless they were, at the time, aware that it had been entered into by F. professedly as the agent of the company; and Held, also, that the payments, whether by money or the allowance of freight, were not any evidence of adoption in the absence of such previous knowledge:—Held, also, that there was no evidence to go to the jury that F. so acted, or professed to act, and that the plaintiffs should therefore have been nonsuited. Osler, J., dissented, on the ground that there was no misdirection, and that the appellants had failed to convince him that the unanimous judgment of the court below was wrong. Morrison, J. A., agreed with Osler, J. The court being thus equally divided, the appeal was dismissed, and the judgment of the Queen's Bench stood affirmed. *Murray et al. v. Canada Central R. W. Co.*, 7 A. R. 646. Affirmed in Supreme Court, 8 S. C. R. 313. Special leave to appeal to Her Majesty in council refused. See 8 App. Cas. 574, p. 659.

III. RATIFICATION OF AGENCY.

See *Vanderlip v. Smyth*, 32 C. P. 60.

IV. AGENT TAKING COMMISSION FROM OPPOSITE PARTIES.

The plaintiff, a land agent, was employed by defendants to sell certain land at a stipulated price, and in the course of his employment, and after negotiating with an intending purchaser, an exchange was effected by certain of his lands being taken in part satisfaction of the defendants' price, and the plaintiff demanded commission from the purchaser for effecting such exchange, which the purchaser, without acknowledging the plaintiff's right to make it, acceded

to, and paid a sum of money to the plaintiff. The plaintiff said that such sum was paid not as commission, but as a gratuity:—Held, that such a sum, whether received as a commission strictly so called, or as a gratuity, was a profit directly made in the course of and in connection with the plaintiff's employment, and would, therefore belong to his employers, the defendants; but as it appeared that the defendants were fully aware of the plaintiff having received such sum, and made no objection to his retaining it, but with full knowledge thereof negotiated with him for a settlement of his remuneration, they could not afterwards, in an action by the plaintiff for such remuneration, set off such sum. *Culverwell v. Campton et al.*, 31 C. P. 342.

V. POWER AND AUTHORITY OF AGENT.

1. Officers of the Crown.

Per Ritchie, C. J.:—Held that neither the engineer nor the clerk of the works nor any subordinate officer in charge of any of the works of the Dominion of Canada, have any power or authority express or implied under the law to bind the crown to any contract or expenditure not specially authorized by the express terms of contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract. *O'Brien v. The Queen*, 4 S. C. R. 529.

2. Agents of Corporations.

The plaintiffs were a company incorporated under C. S. C. c. 63, and 24 Vict. c. 19, for the manufacture and sale of cheese, &c. On the 10th of August, 1878, a written agreement was entered into between one C., the plaintiffs' secretary and salesman, and one M., on behalf, as was stated, of the plaintiffs and defendants respectively, and which was signed by C. and M., for the sale of the whole of the plaintiffs' July cheese, as also of their August, September, and October cheese, at prices named:—Held, that upon the evidence set out in the case, C., in entering into the contract for the plaintiffs, was acting within the scope of his employment and duties; and that the defendants could not deny M.'s authority to act for them, for they had adopted and ratified the agreement. *The Albert Cheese Co. v. Leeming et al.*, 31 C. P. 272.

D. on the suggestion of R. and the bank of O. that he should purchase certain lumber held by the bank as security for advances made to R. required a guarantee from the bank that the lumber should be satisfactorily culled, and any deficiency paid for by the bank. The directors of the bank thereupon resolved to submit the lumber to a culler, and if he reported satisfactorily, to give the guarantee. Their local agent, however, with the approbation of their head manager, without previously employing a culler to report, gave a guarantee in writing, but not under seal, "on behalf of the bank" that the lumber should be satisfactorily culled previously to shipment:—Held, that the bank was liable on the guarantee for any deficiency resulting from unsatisfactory culling, for the plaintiffs were warranted in assuming that the agent giv-

ing t had the necessary authority, and no seal was required; and if the bank wished to repudiate it, they should repay the money paid to them by D. for the lumber:—Held, that the above guarantee did not come within the description of a guarantee for the act of third party, for the bank were selling under R. S. O. c. 121, by virtue of being holders of a warehouse receipt. *Dobell et al. v. The Ontario Bank et al.*, 3 O. R. Chy. D. 299. Reversed on appeal. 9 A. R. 484.

See also "RAILWAYS AND RAILWAY COMPANIES," II. 2., p. 673.

See also VIII. p. 649.

3. As to Promissory Notes.

Upon the insolvency of J. B., who carried on business under the name of B. & Co., his wife purchased the estate from his assignee, and authorized him by power of attorney to manage the same, and to make promissory notes in and about her said business. Being pressed for payment of notes which he had given for a debt due before his insolvency, he gave his creditor notes signed per pro. B. & Co. J. B. Subsequently he was sued on these notes, when he swore they were his wife's notes, and made with her authority, whereupon the holder sued the wife. In the action against her she swore that she had separate estate and that she had purchased her husband's estate with it; but, on the advice of her counsel, she declined to give any information concerning it. She swore that J. B. had no authority to give the notes in question, but it appeared that he frequently discussed his own affairs with her, and he would not swear that he did not tell her that he had given these notes:—Held, affirming the judgment of the County Court, that notwithstanding the power of attorney, the real scope of J. B.'s agency could be ascertained from any admissible evidence, and that there was sufficient to justify the finding of the judge that J. B. had authority to sign the notes. *Cooper et al. v. Blacklock*, 5 A. R. 535.

4. As to Sale of Goods.

The plaintiff sued the defendant, a pianomaker, for breach of a warranty given by his salesman on the sale of a piano that the instrument was then sound and in good order:—Held, that the salesman had authority to give the warranty. *McMullen v. Williams*, 5 A. R. 518.

The plaintiffs delivered to one R. some cultivators for the purpose of selling, as their agent, for cash or good notes. Three of these he exchanged with the defendant, who was aware of the fact of agency, for a buggy, which he sold and retained the proceeds. It was shewn that on a previous occasion R. had traded a cultivator with one M. for a horse, which he sold and gave the plaintiffs a forged note purporting to be that of the purchaser; and on the same day he traded another cultivator with one D., for a watch and \$7, but for this also it was said he returned a note to the plaintiffs. It was not shewn that defendant knew of either transaction, and the plaintiffs had prosecuted R. for the forgery. In an action of replevin the jury gave a verdict in favour of the defendant, but the county judge in term set it aside, and directed judgment to be en-

tered for the plaintiffs, which on appeal was affirmed, with costs. *Stewart et al. v. Rounds*, 7 A. R. 515.

See *Ockley et al. v. Masson*, 6 A. R. 108, p. 644.

5. Other Cases.

An agent instructed to receive payment for his principal, cannot as a general rule accept anything but money. See *Frazer v. Gore District Mutual Fire Ins. Co.*, 2 O. R. 416, p. 353.

See *Nasmith v. Manning*, 5 A. R. 126, p. 134.

VI. RIGHTS OF AGENT AGAINST PRINCIPAL.

In consideration that the plaintiff would act as agent for the defendant in the purchase and consignment of furs to the defendant, and assume one-third of the losses to the extent of \$3,000, all losses above that amount to be borne by the defendant, he agreed to pay plaintiff one-half the net profits of each year's transactions. The plaintiff impugned the bona fides of a settlement which he had been induced to make with the defendant, acting through an agent, and the court being satisfied that the settlement had been secured by the fraudulent misrepresentations of such agent,—Held, the plaintiff entitled to an account of the transactions and an inspection of the books of the defendant, notwithstanding the provisions of the statute 36 Vict. c. 25, s. 1 (R. S. O. c. 133, s. 3). *Rogers v. Ullmann*, 27 Chy. 137.

Liability of principals to brokers for moneys advanced for the purpose of buying and selling grain on margin. See *Rice et al. v. Gunn et al.*, 4 O. R. 579, p. 258.

VII. LIABILITY OF AGENT TO PRINCIPAL.

1. Agent Purchasing Property of Principal.

The rule of equity which prevents an agent acquiring a benefit for himself in any dealings with the estate of the agency, acted upon where an agent had been employed to sell or exchange certain lands of the principal, which, however, the agent had been unable to effect, and the property was shortly after offered for sale by auction under a power of sale in a mortgage, when the agent bid, and became the purchaser. The court (Spragge, C.) in a suit impeaching the purchase, declared the agent a trustee for the principal; but as the plaintiff made several unfounded charges of fraud and other misconduct, the relief asked was given, without costs. *Thompson v. Holman*, 28 Chy. 35.

The defendant had for some years acted for the plaintiff in looking after his lands, and paying the taxes; but in 1874, they had some difficulty, and from that time the plaintiff ceased to correspond with the defendant, and employed one H. to pay the taxes, and look after the property. H., without any instructions from the plaintiff, on one occasion wrote to the defendant requesting him to ascertain the amount of the taxes, and to draw on him therefor, with which request the defendant complied, but nothing further occurred to change the relative position of the parties before the sale:—Held, per Bur-

ton, J.A., that under these circumstances the confidential relations which had previously existed must be held to have ceased, and that the defendant was not precluded from purchasing the plaintiff's land at a sale for taxes. Per Proudfoot, J., that what took place could not have the effect of determining the fiduciary relationship between them, and therefore the defendant could not purchase the plaintiff's land to his prejudice. *Fleming v. McNabb*, 8 A. R. 656.

2. For Investment of Money.

Held, that it is a breach of duty in a person entrusted with money to invest on real estate to invest on the security of a second mortgage, unless with the sanction of the lender, which such person must prove, and which the evidence in this case failed to establish. The value of the property herein was about \$1,000; the first mortgage being for \$325, and the second for \$400, taken to the plaintiff. The borrower was a respectable mechanic in receipt of good wages, occupying the property himself, which was situated in the place where all the parties resided and carried on business. The learned judge at the trial found that the defendant was not guilty of negligence so far as the value was concerned, and the court refused to interfere. Remarks as to the proper form of declaration in such case, where the defendant was not paid by the lender but by the borrower. Upon the conflicting evidence, set out in the case, the learned judge at the trial found that the plaintiff had not been informed of the first mortgage, under which the property was sold, leaving only about \$60 applicable to the second mortgage. The court refused to set aside this finding, and sustained the verdict for the plaintiff. *Carter v. Hatch*, 31 C. P. 293.

VIII. LIABILITY OF PRINCIPAL TO THIRD PERSONS.

1. For Fraud of Agent.

On the 22nd August, 1879, the defendants' account at the Bank of Montreal, where the corporation account was kept, was overdrawn \$1,157.64. A resolution of the council was thereupon passed, authorizing the mayor to borrow from some banking institution a sum not exceeding \$2,000, to meet the current liabilities until the taxes were available, and authorizing him and the town clerk to sign the necessary documents therefor, and to affix the corporation seal. On 2nd September, a promissory note, in accordance with this resolution, was made, and was discounted at the Bank of Montreal, and the proceeds placed to the defendants' credit. On 5th September, a similar note was made and discounted at the plaintiffs' bank, where the defendants had kept an account, but which was virtually closed, though there was a small balance still remaining to their credit. The last note was in fact fraudulently procured to be made and discounted by one T., who was the defendants' clerk and treasurer, and who was in default, to cover up his defalcations, but of this the plaintiffs knew nothing. T., as such treasurer, then, chequed out of plaintiffs' bank \$1,656 of this amount, which he deposited to the defendants' credit at the Bank of Montreal, and then

paid it out on corporation cheques for authorized corporation purposes:—Held, in an action for money had and received, that the plaintiffs were entitled to recover the \$1,656, for that T., though acting fraudulently, had acted in a matter within the scope of his authority, and the defendants had received the benefit of the fraud. *Molson's Bank v. Corporation of the Town of Brockville*, 31 C. P. 174.

The plaintiff, who applied to the defendants, through one W., their agent, for a loan, requested them by his application to send the money "by cheque, addressed to W." In accordance with their custom to make their cheques payable to their agent and the borrower to insure the receipt of the money by the latter, they sent W. a cheque, payable to the order of himself and the plaintiff. W. obtained the plaintiff's endorsement to the cheque, drew the money, and absconded. The plaintiff swore that he did not know that the paper he signed was a cheque, and there was no evidence to shew that he had dealt with W. in any other character than as the defendants' agent, through whose hands he expected to receive the money:—Held, affirming the decree of Proudfoot, V. C., restraining proceedings on the mortgage which the plaintiff had given to the defendants as security for the loan, and directing a reconveyance, that it was W.'s duty to endorse the cheque to the plaintiff or to see that he received the money, and that the defendants, who had put it in his power to commit the fraud, must bear the loss. *Finn v. Dominion Savings and Investment Society*, 6 A. R. 20.

C., freight agent of respondents at Chatham, and a partner in the firm of B. & Co., caused printed receipts or shipping notes in the form commonly used by the railway company to be signed by his name as the company's agent, in favour of B. & Co., for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from B. & Co. the flour addressed to the appellants, and were attached to drafts drawn by B. & Co., and accepted by appellants. C. received the proceeds of the drafts and absconded. In an action to recover the amount of the drafts:—Held (Fournier and Henry, JJ., dissenting), that the act of C. in issuing a false and fraudulent receipt for goods never delivered to the company, was not an act done within the scope of his authority as the company's agent, and the latter were therefore not liable. *Erb v. The Great Western Railway Co. of Canada*, 5 S. C. R. 179; 3 A. R. 446; 42 Q. B. 40; *Oliver v. Great Western R. W. Co.*, 28 C. P. 143.

2. Other Cases.

The plaintiff, who had purchased a special excursion ticket from Toronto to Niagara and return on the same day by a steamer of the defendants, and which had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding the plaintiff's fare, and the latter refused to pay it, the porter by the purser's direction, laid hold of a valise which the plaintiff was carrying and attempted to take it and hold it for the fare, whereupon a

scuffle ensued, and the plaintiff was injured:—Held, Osler, J., dissenting, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act. It appeared that the purser had been summoned by the plaintiff before a magistrate for the assault, and a fine imposed, which he paid. Per Wilson, J. This under 32-33 Vict. c. 20, s. 45, Dom., though a release to the purser, did not constitute any bar to the present action against the company. Held, also, that the alleged imprisonment of the plaintiff by the purser in his office for non-payment of his fare, not being an act which the defendants themselves could legally have done, the defendants were not liable for it. *Emerson v. The Niagara Navigation Co.*, 20. R., C. P. D. 528.

Action against a bank to recover amount paid on forged endorsements. Negligence of agent.—Estoppel. See *Agricultural Savings and Loan Association v. Federal Bank*, 6 A. R. 192, p. 68.

Held, that a petition of right does not lie to recover compensation from the Crown for damages occasioned by the negligence of its servants to the property of an individual using a public work. *The Queen v. McFarlane et al.*, 7 S.C.R. 216.

Liability of a municipal corporation for the act of its servants.—“Respondeat superior.” See *McSorley v. The Mayor, &c., of the City of St. John et al.*, 6 S. C. R. 531.

IX. MISCELLANEOUS CASES.

The contract in this case having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name. *Weldon v. Vaughan et al.*, 5 S. C. R. 35.

In torts the principle of agency does not apply; each wrong doer is a principal. *The Ontario Industrial Loan and Investment Co. v. Lindsey et al.*, 4 O. R., Chy. D. 473.

See *Corby et al. v. Williams*, 7 S. C. R. 470; 5 A. R. 626, p. 112.

PRINCIPAL AND SURETY.

I. CONTRACT OF SURETYSHIP.

1. *Generally*, 652.
2. *Bills and Notes*—See *BILLS OF EXCHANGE AND PROMISSORY NOTES*.
3. *Guarantees*—See *GUARANTEE AND INDEMNITY*.

II. LIABILITY OF SURETY, 652.

III. DISCHARGE AND RELEASE OF SURETY.

1. *Course of Dealing*, 652.
2. *Giving Time to Principal*, 654.

IV. RIGHTS OF SURETY.

1. *Assignment of Securities*, 654.

V. CONTRIBUTION AMONG CO-SURETIES, 655.

VI. PROCEEDINGS AGAINST SURETY.

1. *Pleading*, 656.
2. *Other Cases*, 656.

VII. MISCELLANEOUS CASES, 657.

VIII. SURETIES OF PARTICULAR PERSONS.

1. *Collectors*—See *ASSESSMENT AND TAXES*.
2. *Treasurers of Municipalities*—See *MUNICIPAL CORPORATIONS*.
3. *Secretary-Treasurer of Public School Boards*—See *PUBLIC SCHOOLS*.

I. CONTRACT OF SURETYSHIP.

1. *Generally*.

Where a mortgagor who has covenanted for payment of the mortgage debt sells his equity of redemption subject to such mortgage he becomes security for the purchaser for the payment of such debt, and if the same is allowed to run into default he will be entitled to call upon his assignee to pay such debt. *Campbell v. Robinson*, 27 Chy. 634.

See *Keith v. Fenelon Falls Union School Section et al.*, 3 O. R., Chy. D. 194, p. 662; *Exchange Bank v. Springer*.—Same *Plaintiffs v. Barnes*, 29 Chy. 270, p. 656; *Lightbound et al. v. Warnock*, 4 O. R. 187, p. 312.

II. LIABILITY OF SURETY.

The testator by his will left money to his children, which was to be paid to them on their coming of age, and be deposited by the executors in a savings bank in the meantime. One of the executors appropriated and set apart certain moneys of his testator to answer the trusts of the will, which moneys were afterwards paid by him to the solicitor of the guardian of the infants, who made default in payment over of the same, and the amount never reached the hands of the guardian.—Held, that the moneys by the act of setting apart had become, in the hands of the executor, impressed with the trusts of the will, and he could not properly pay the same to the guardian, nor could the guardian properly receive the amount; and, although the fund never reached the hands of the guardian so as to render her surety liable to make good the amount, yet, under the circumstances, the guardian was personally responsible for the money so paid to her solicitor, and a decree to that effect was pronounced, with costs; though as against the surety the bill was dismissed, with costs. *Galbraith v. Duncombe*, 28 Chy. 27.

See *Postmaster General v. McColl et al*, 31 C. P. 364, p. 626.

III. DISCHARGE AND RELEASE OF SURETY.

1. *Course of Dealing*.

The defendants made a joint and several promissory note with one H., as sureties for him, payable to the plaintiff:—Held, affirming the

judgment of the County Court, that in default of payment at maturity their liability to pay became absolute; and that it was no defence for them that the plaintiff neglected to present the note for payment, or give notice of non-payment by H., of which they were ignorant, and that believing the note had been paid by H., they took no steps to recover from him, although he was able to pay, and before they became aware of such non-payment H. had become insolvent. *Wilson v. Brown et al.*, 6 A. R. 87.

After the defendants had become sureties for a Division Court clerk, a special arrangement was made between the plaintiffs and the clerk, under which the latter was to receive no costs but disbursements only in all suits entered with him by the plaintiffs in which nothing was realized, and he on his part guaranteed that the court had jurisdiction. This was subsequently varied by giving to the clerk fifty cents in addition to the disbursements in such suits. Periodical statements were made from time to time according to the agreement, and a cheque given for the balance thus shewn. It was afterwards discovered that the statements were incorrect, and that moneys collected by the clerk had not been paid over:—Held, that the special arrangement made with the clerk discharged the sureties:—Held, also, that the periodical statements were not conclusive as against the plaintiffs. *Victoria Mutual Fire Ins. Co. v. Davidson et al.*, 3 O. R., C. P. D. 378.

S. had been treasurer of a municipal corporation, and a bond which he had given having been mislaid, the council being under the impression that he had given no security, required him to furnish it. The council, having examined his books, concluded that they were in his debt, as the books shewed, and the reeve believing this was the case represented to the defendant that S., defendant's son, "was all right on the books." Defendant on this signed a bond as surety for the due performance by S. of his duties which he said he would not have done but for the reeve's statement. The reeve also said that if defendant did not go his surety S. would lose his position. Afterwards, as S. had been drinking, defendant wrote to the council desiring to have his bond annulled, but he withdrew this letter at the request of S. After S. had been dismissed, and the deficiency in his accounts discovered, defendant said he would pay whatever had occurred since he signed the bond. Upon the first trial no plea of fraud was put in, and a new trial was granted on affidavits not raising this defence; but defendant gave notice that he would at the trial move to add such a plea. The learned judge at the trial refused the application, holding that the plea could not be supported on this evidence, but he found that the bond was given upon the assumption and statement that the treasurer was not then in arrear:—Held, *Hagarty, C. J.*, diss., that the plea should have been added, and that defendant was entitled to a verdict upon it. Per *Hagarty, C. J.*, there was no false statement, and no fraud, and therefore the plea was not sustained. *The Corporation of the Village of Gananoque v. Stunden*, 1 O. R., Q. B. D. 1.

See *Canadian Bank of Commerce v. Green et al.*, 45 Q. B. 81, p. 76; *Barber v. Morton*, 7 A. R. 114, p. 82.

2. Giving Time to Principal.

H. & M. were carrying on business in co-partnership, and H. becoming dissatisfied with the manner in which the business was conducted, a dissolution was agreed upon, in October, 1876, with the knowledge and approval of the plaintiffs, one of them having assisted in arranging it, H. retiring and assigning to M. his interest in the partnership assets, in consideration of \$1,332, for which M. gave his promissory notes at three, six, nine, and twelve months, and bound himself to pay all the debts of the co-partnership. M. continued to carry on the business, and in doing so had several transactions with the plaintiffs, from whom he continued to receive goods on credit, giving promissory notes for the price as well as to cover the firm's indebtedness, during which time the plaintiffs rendered periodical statements to M., ignoring apparently the existence of H., in which the liabilities of the firm and M. were embraced; although expressed "M. and H. Liability," giving the items, and "J. M. Liability," also detailing the items. M., by means of contra accounts against H., had reduced the latter's claim to about \$400. In November or December, 1876, the plaintiffs applied to H. to renew the partnership notes, but this he declined to do on the ground that he was not liable, notwithstanding which the plaintiffs continued to deal with M. until he became insolvent in January, 1880, when they instituted proceedings against both partners to recover their claim:—Held, *Patterson, J. A.*, dissenting, reversing the finding of *Cameron, J.* (31 C.P. 430), that the effect of the dealings between H. and M. was not to constitute H. a surety for M., and that he and M. remained liable to the plaintiffs for the partnership debts. *Birkett et al. v. McGuire et al.*, 7 A. R. 53.

A married woman signed a note in blank, and gave it to her son "to be used as he liked." He filled it up for \$1,200, signed it, and transferred it to the plaintiff, who was not made aware of the circumstances under which it had been signed. It was renewed twice without the married woman's name, the original note remaining in the plaintiff's hands:—Held, reversing the judgment of the court below, that the married woman was a surety in respect of the note for her son; and that the authority to the son as to using the note did not extend to keeping it afloat after maturity without her knowledge; and that she had been discharged by the extension of the time of payment. *Devaney v. Brownlee et al.*, 8 A. R. 355.

IV. RIGHTS OF SURETY.

1. Assignment of Securities.

The M. manufacturing company, in the usual course of their business, took from their agents, notes for machines supplied to them, which were transferred by the M. company as collateral security to a bank where they had a line of credit. The agreement with the agents was that upon their substituting their customers' notes for their own, they were entitled to the delivery up of the latter. The defendant, who was the agent, had given notes for machines supplied him, which were handed to the bank by the company. He afterwards transferred to the company a large number of his customers' notes

The bank manager finding some of the defendant's notes overdue, demanded that they should be replaced by fresh paper, and the company then applied to the defendant, who gave the notes sued on without getting an adjustment of accounts between them, though there was but a small balance due to the company; and these notes were transferred to the bank and the old notes given up. The M. company got into difficulties, and the bank sued B., their president, and another who, jointly with the M. company, had guaranteed the company's account to the extent of \$50,000. B., in order to protect himself, resigned the presidency, and undertook to pay off the company's indebtedness to the bank, and take all their securities. A resolution of the board was passed approving of this, and the M. company directed the bank to transfer to B. the company's securities on payment. B. applied to the plaintiff for the money, and he advanced the requisite amount, having obtained the same by pledging stock and other securities to a loan company, and took all the notes held by the bank to hold for collection to pay expenses, repay the advances, pay their indebtedness to the loan company, and to account to B. The notes sued on were amongst those transferred to the plaintiff, who took them without notice of their character, or the state of the account between the defendant and the M. company:—Held, that he stood in the place of the bank, and succeeded to all its rights, and that the defendant was liable to the full amount of his notes in the plaintiff's hands. *Cowan v. Doolittle*, 46 Q.B. 398.

The plaintiff sold 24 shares in a vessel to B. & Co., who, not being able to pay cash, procured O. to make a note in the plaintiff's favour, which was endorsed by him and B. In order to secure himself, O. took a bill of sale to himself of the shares. The plaintiff discounted a note at the bank, and after several renewals was obliged to pay it. In an interpleader issue between the plaintiff and the execution creditor of O., to try the right to the shares:—Held, Armour, J., dissenting, that the effect of this arrangement, which is more fully stated in the report of the case, was properly held at the trial to be to make B. the principal debtor to the bank for the amount of the note, and the plaintiff and O. his co-sureties therefor; and upon payment thereof, that the plaintiff was equitably entitled to the 24 shares held by O., his co-surety, as security against his liability on the note:—Quære, whether interpleader is a proper remedy in such a case, and whether the shares could be seized and sold by the sheriff. Per Hagarty, C. J. Some proceeding to which O. & B. were parties, in which the title to the shares could be cleared up, would be a better remedy. Per Armour, J. The question raised could not be properly adjudicated upon without O. & B. being parties. The plaintiff and O. were not sureties, but the plaintiff was the creditor, B. the principal debtor, and O. the surety; and on default the plaintiff was entitled to compel O. to realize the security which he held, and apply it towards payment of the debt. *Trerice v. Burkett*, 1 O. R., Q. B. D. 80.

V. CONTRIBUTION AMONG CO-SURETIES.

A loan and savings society appointed G. their treasurer, and the plaintiffs and defendant by

two separate bonds became sureties for the due discharge of the duties of such officer. By several Acts of the legislature the society was incorporated, and its powers materially increased, and G. appointed its manager, the duties of which it was shewn were similar to those of treasurer, the name of manager being given simply as one of honour, and did not involve any additional duties. G. made default in his office, and a suit was instituted by the society against all the sureties, which was compromised by the plaintiffs paying about one-half of the sum claimed by the society:—Held, that the defendant was bound to contribute his share of the money so paid, and that the change in the name of the officer afforded no defence to the claim of the plaintiffs:—Held, also, that in such a case the entries of G. in the books of the society were not evidence against the sureties during the lifetime of G. *Murray v. Gibson*, 28 Chy. 12.

See *Small v. Riddell et al.*, 31 C. P. 373, p. 82.

VI. PROCEEDINGS AGAINST SURETY.

1. Pleading.

One M., and the defendants as his sureties, executed a bond conditioned for the good behaviour of M., a clerk of the plaintiffs' at Montreal. The bond was executed at Hamilton by the defendants who were resident there. M. made default at Montreal and absconded. Proceedings were taken against the sureties, without joining M.:—Held, (affirming the order of Proudfoot, V. C.,) that the plaintiffs could not proceed against the sureties alone, if they required the joinder of the principal in order that they might have their remedy over against him. Per Spragge, C. Though the breach occurred in Montreal, and there was no cause of action till default, yet there was a potential equity in the defendants, coeval with the execution of the bond, which became a right of suit on the default of M.; and there was also an implied contract on the part of M., upon execution of the bond, to repay to his sureties any money that they might have to pay by reason of his default. *Exchange Bank v. Springer—The Same Plaintiffs v. Barnes*, 29 Chy. 270.

See *The Corporation of the Village of Gananoque v. Stunden*, 1 O. R. 1, p. 653.

2. Other Cases.

A mortgagee proceeded on the same day to foreclose the property of the mortgagor and his sureties by several bills upon their respective mortgages, and to sue at law in different actions the same parties on notes held by the plaintiffs, to which the mortgages were collateral:—Held, that only one suit in equity was necessary as all parties might have been brought before the court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits; and the court would not be deterred from granting relief by the circumstance of a decree being complicated. *Merchants Bank v. Sparkes*, 28 Chy. 108.

In an action on a bond against two sureties, the defendant R. set up the defence and gave

evidence that his signature to the bond had been obtained by fraud. The evidence of his co-defendant, C., was tendered for the purpose of shewing that C.'s signature to the bond had also been so obtained, which was rejected as inadmissible:—Held, that the evidence of C. was admissible as shewing a fraud practised on him, with respect to the same instrument by the same person, and at or about the same time as the alleged fraud on R., and because it was confirmatory of R.'s evidence; and a new trial was ordered. Per Armour, J., when a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue; therefore it was competent for C. to deny the execution of the bond, his pleading not expressly admitting it. *The Waterloo Mutual Ins. Co. v. Robinson et al.*, 4 O. R., Q. B. D. 295.

See *Chamberlain v. Sovais*, 28 Chy. 404, p. 470, *Cochrane v. Boucher et al.*, 3 O. R. 462, p. 93.

VII. MISCELLANEOUS CASES.

Where sureties for a debt gave to the creditor a second mortgage on land as additional security, and foreclosure proceedings are taken by the first mortgagee:—Held, that the creditor, on being notified thereof, should either make himself a party to the suit and prove his claim, or notify the sureties to enable them to prove if they so desired; but,—Held, that the evidence in this case shewed that the sureties had notice, at all events some three months before the day of redemption, which was sufficient:—Held, also, that the fact of two co-debtors changing their position so as to make one of them as between themselves a surety, would not affect the creditor without his consent. *Jones v. Dunbar et al.*, 32 C. P. 136.

One of the defendants herein set up as a defence that he was surety for part of the claim and principal debtor as to the residue, and as to the latter admitted his liability, but claimed that he could only be called upon to pay it on the execution of a proper release by the plaintiff of all liability against him in respect of the said claim:—Held, clearly no defence. *Ib.*

When a claim against an estate of a deceased person is one arising out of a contract of suretyship, the court will not, unless by consent of all parties, make an administration decree except on a bill filed. *Re Colton—Fisher v. Colton*, 8 P. R. 542.—Proudfoot.

The principal and surety being here the plaintiff and defendant respectively, *Re Colton*, 8 P. R. 542, which decides that in a case of principal and surety a summary application to administer under G. O. Chy. 638 is improper, was held not to apply. *Re Allan—Pocock v. Allan*, 9 P. R. 277.—Full court.

See *Hutton v. Federal Bank*, 9 P. R. 568, p. 69.

PRINTING.

POLICIES OF INSURANCE.—See INSURANCE I., 6, p. 354.

PRISONER.

See HABEAS CORPUS.

PRIVILEGED COMMUNICATIONS.

See DEFAMATION—EVIDENCE.

PRIVY COUNCIL.

I. BOND AND SECURITY, 658.

II. APPLICATION TO, FOR NEW TRIAL, 658.

III. APPEALS TO, 658.

I. BOND AND SECURITY.

On a motion to disallow a bond filed by the defendants (appellants) pending an appeal to the Privy Council, which was in the form given in Rule 36, O. J. Act, with some further recitals, it was objected that the condition of the obligation ought to read "do and shall effectually prosecute such appeal, and pay," &c., instead of "or pay," as given in the form; and also that the condition should be to pay "what had been found due by the court appealed from," instead of "such costs and damages as shall be awarded:—Held, that "or" was the correct word to use, and that "effectually prosecute" meant "successfully prosecute," but the bond was disallowed on the second objection, it being held that the proper condition must be drawn based upon the language in R. S. O. c. 38, s. 27, sub-s. 4. *International Bridge Co. v. Canada Southern R. W. Co.*, 9 P. R. 250.—Burton.

See *Citizens' Ins. Co. v. Parsons et al.*, 32 C. P. 492, p. 175.

II. APPLICATION TO, FOR NEW TRIAL.

Although the Privy Council have the right, if they think fit, to order a new trial on any ground, that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence, or failed to understand or appreciate it. *The Connecticut Mutual Life Ins. Co. of Hartford v. Moore*, 6 App. Cas. 644.

III. APPEALS TO.

Their lordships will not advise Her Majesty to admit an appeal from the Supreme Court of the Dominion save where the case is of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance, or of a very substantial character. *Prince v. Gagnon*, 8 App. Cas. 103.

Petition for special leave to appeal refused the case, depending on a disputed matter of fact whether there had been a gift or sale of certain goods of the value of £1,000. *Ib.*

Petition for special leave to appeal in a case involving only an issue of fact refused. *Canada Central R. W. Co. v. Murray*, 8 App. Cas. 574.

Such petition must state fully but succinctly the grounds upon which it is based; the record not being before their lordships until forwarded by the proper authorities. *Ib.*

See *Valin v. Langlois*, 5 App. Cas. 115, p. 117.

PROCHEIN AMY.

See HUSBAND AND WIFE.

PRODUCTION OF DOCUMENTS.

See EVIDENCE.

PROHIBITION.

To JUDGES OF DIVISION COURTS—See DIVISION COURTS.

Held, that the prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint, as by R. S. O. c. 74, s. 4, the practice of appealing in such a case is assimilated to that under Dom. Stat. 33 Vict. c. 47, which confines the right of appeal to the defendant. A prohibition was therefore ordered, but without costs, as the objection to the jurisdiction had not been taken in the court below. *In re Murphy v. Cornish*, 8 P. R. 420.—Osler.

The affidavit on which to obtain an attaching order may be made by the attorney of the judgment creditor, or by a partner of the attorney. Semble, that proceedings on such order could not be prohibited on the ground that it was founded on a defective affidavit, that being a mere matter of practice. *In re Sato v. Hubbard*, 8 P. R. 445.—Osler.

Per Ritchie, C. J., and Strong and Fournier, JJ., that a writ of prohibition issued under Art. 1031, as was the writ issued in this case, will only lie to an inferior tribunal and not to a municipal officer. *Colé et al. v. Morgan*, 7 S. C. R. 1.

See *In re Wilson v. McGuire*, 2 O. R. 118, p. 117; *Re O'Brien*, 3 O. R. 326, p. 267; *Neald v. Corkindale et al.*, 4 O. R. 317, p. 168.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROTEST.

OF BILLS OR NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROVINCIAL LAND SURVEYOR.

See SURVEY.

PUBLIC HEALTH.

See MUNICIPAL CORPORATIONS.

PUBLIC OFFICERS.

See OFFICE—POST OFFICE.

PUBLIC SCHOOLS.

I. TRUSTEES.

1. *Disqualification of*, 660.

2. *Election of*, 660.

II. SECRETARY-TREASURER AND HIS SURETY, 661.

III. CONTRACTS WITH TRUSTEES, 662.

IV. DISSOLUTION OF SCHOOL SECTIONS, 662.

V. SCHOOL SITES.

1. *Requisition to Municipal Councils for Funds*, 662.

2. *Change of*, 663.

VI. LOANS FOR SCHOOL PURPOSES, 663.

VII. HIGH SCHOOL DISTRICTS, 663.

VIII. MISCELLANEOUS CASES, 665.

I. TRUSTEES.

1. *Disqualification of*.

Held, Osler, J., doubting, on a special case stated for the opinion of the Court of Chancery, and transferred to this court, that the fact of the public school board of the city of Toronto entering into an agreement with and purchasing their stationery and school supplies from a publishing company, and having obtained gas from a gas company, and insured their property in certain insurance companies, of which said companies the plaintiff was a shareholder, did not disqualify him from acting as a trustee of the school board, or render his seat vacant, under 44 Vict. c. 30, s. 10, O. *Lee v. The Public School Board of the City of Toronto*, 32 C. P. 78.

Quare, per Osler, J., whether the case could properly be entertained, no fact being disclosed by which jurisdiction could be exercised under the Act relating to mandamus and injunction, R. S. O. c. 52, s. 30, no wrongful act having been actually done by the school board, but merely an injury to the plaintiff's rights threatened, it being alleged that the board intended to declare the seat vacant. *Ib.*

2. *Election of*.

Where certain persons were elected school trustees, and, at a meeting of the board held subsequently to the election, were declared duly elected, but, proceedings having been meanwhile commenced to question the validity of the election, at a subsequent meeting of the board, they acquiesced in the conclusion of the board to hold a new election, and became candidates again, and canvassed as such, until the twenty days allowed

for disputing the first election had elapsed (the proceedings formerly commenced for that purpose having been meanwhile dropped), and were not elected at the second election:—Held, they could not afterwards maintain a suit to have it declared they were the duly elected trustees. *Foster et al. v. Stokes et al.*, 2 O. R., Chy. D. 590.

II. SECRETARY-TREASURER AND HIS SURETY.

One T., who acted in the capacity of secretary-treasurer of the plaintiffs, who had not been appointed in writing, and had not given security as required by the statute in that behalf, absconded with certain moneys which had been received by him, as such secretary-treasurer, from the defendants. The plaintiffs had recognized T. as their secretary-treasurer by entrusting him with the custody of their books and papers, by allowing him to receive moneys for them, by auditing his accounts and receiving and approving of the auditor's reports. Held, that R. S. O. c. 204, s. 29, which provides that, in the case of a rural school section corporation, the resolution, action or proceeding of at least two of the trustees shall be necessary in order lawfully to bind such corporation, does not apply to acts of duty of the secretary-treasurer; and that payment by the municipality of school moneys to T. was binding on the trustees:—Held, also, that if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is, or can be, adduced of his appointment. *School Trustees of the Township of Hamilton v. Neil*, 28 Chy. 408.

A municipal corporation passed a by-law for raising a loan to liquidate a debt to be incurred in enlarging the school-house in a public school section, and providing for the issue of debentures for that purpose, and for levying a special rate to pay the interest thereon, and to create a sinking fund for payment of the principal; and the municipal authorities paid the moneys so raised by the said special rate to the secretary-treasurer of the school board of the said section. A., the secretary-treasurer of the school board, and B., as his surety, gave a bond of office, reciting that A. had been appointed such secretary-treasurer, and that "it was required that security should be given for the due and faithful performance of any and all the duties pertaining to such office," and conditioned to "correctly and safely keep any and all moneys and papers belonging to the said school board, and to faithfully and honestly deliver up, account for, and pay over any moneys which at any time thereafter might come into his hands and possession as such secretary-treasurer," and A. received and made default in respect of certain moneys improperly paid to him as such secretary-treasurer:—Held, that the condition must be read with reference to the recital, and its scope might be thereby restricted, and reading the two together B. was not liable for the moneys so received by A., which were outside the duties pertaining to his office, and should have been retained by the municipal corporation. B. having been informed by the school board that A. was in default, but not in respect of what moneys the default was made, as to which he made no enquiries, and having at the request of the school board given a mortgage to secure the

liability which he was informed he had, by reason of such default, incurred as surety under the above bond, and having subsequently ascertained that the default was partly in respect of moneys so improperly paid to A.:—Held, that B. was entitled to redeem on payment of the balance only of the moneys for which he was held liable as surety, the mortgage having been executed under a mistake. *Keith v. Fenelon Falls Union School Section et al.*, 3 O. R., Chy. D. 194.

III. CONTRACTS WITH TRUSTEES.

In an action by a school teacher to recover damages as for a wrongful dismissal, it was shewn that the agreement to employ the plaintiff was made in writing, under seal and signed by two, of the three school trustees, but not at the same time or at any meeting of the trustees called for the purpose of transacting school business:—Held, reversing the judgment of the County Court (Haldimand), that the agreement was void under sec. 97 of the Public Schools Act, which provides that "No act or proceeding of a school corporation which is not adopted at a regular or special meeting of the trustees, shall be valid or binding on any party affected thereby." *Lambiere v. The School Trustees of Section No. Three, South Cayuga*, 7 A. R. 506.

See *School Trustees of the Township of Hamilton v. Neil*, 28 Chy. 408, p. 661.

IV. DISSOLUTION OF SCHOOL SECTIONS.

On application to quash a by-law dissolving a union school section:—Held, that the council were not bound to go behind the assessment roll to ascertain whether the petition for such dissolution was signed by a majority of the assessed freeholders and householders, as required by sec. 140 of the Public Schools Act, R. S. O. c. 204. The petition was, that the section might be dissolved, "when," it was added, "a new section may be formed, and a few lots from secs. 2, 7, and 8, might be annexed to equalize the area with other sections":—Held, that this addition, being a mere suggestion, formed no objection. The by-law provided that the dissolution should take effect "from and after," instead of on "the 1st January, 1880":—Held, no objection. The by-law was passed on the 7th April, and this motion was not made until December following:—Semble, that this delay, unexplained, would have been an answer to the application, which may be too late, although within the year fixed by the Act as the extreme limit. *In re McAlpine and the Corporation of the Township of Euphemia*, 45 Q. B. 199.

V. SCHOOL SITES.

1. Requisition to Municipal Councils for Funds.

A municipal corporation has no discretion in accepting or rejecting the requisition of school trustees for funds for a school site, except by a two-thirds vote. An adverse vote by a smaller majority is a virtual acceptance, and the requisition must therefore be complied with. *Re Board of Education of Napanee and the Corporation of the Town of Napanee*, 29 Chy. 395.

2. Change of.

Held, affirming the decree of Proudfoot, V. C., (26 Chy. 590) that the board of education formed by the union of high school and public school trustees, had power to change the site for a school, and purchase another without a by-law or resolution of the county council, or the approval of the lieutenant-governor in council, and that the plaintiff was entitled to specific performance of an agreement by the board to purchase land for such purpose. *Moffatt v. Board of Education of Carleton Place*, 5 A. R. 197.

VI. LOANS FOR SCHOOL PURPOSES.

It appeared from the affidavit of the secretary and treasurer of a school section, that at two regularly called meetings of the duly qualified electors of a school section at which a chairman was appointed, proposals to purchase a site, build a school-house, and borrow money therefor, were put by way of motion and carried, upon which a by-law was passed, authorizing the issue of debentures to raise money for the above purposes:—Held, that under 42 Vict. c. 34, s. 29, sub-s. 3, this was a sufficient submission to and approval of the proposal by the duly qualified school electors of the section, and a rule to quash the by-law was discharged. *In re McCormick and the Township of Colchester South*, 46 Q. B. 65.

VII. HIGH SCHOOL DISTRICTS.

After the repeal of 37 Vict. c. 27, s. 38, O., by 40 Vict. c. 16, s. 18, sub-s. 2, O., a county council, having no power to determine the limits of high school districts, passed a by-law determining the same. By another by-law they repealed it, and established new limits:—Held, that such last mentioned by-law was valid so far as it repealed the first by-law, which was invalid, but that the rest of it must be quashed. *Re Chamberlain and Corporation of the United Counties of Stormont, Dundas, and Glengarry*, 45 Q. B. 26.

In 1879 the township of Grimsby passed a by-law attaching a certain portion of the township to the village of Grimsby for high school purposes. In 1881 the same council similarly annexed another portion. Corresponding by-laws were passed by the village of Grimsby. By 45 Vict. c. 33, O., the township was divided into two townships of North and South Grimsby. In 1882 the council of the township passed a by-law, on the petition of less than two-thirds of the ratepayers, repealing the two former by-laws:—Held, that the two township by-laws, with the corresponding village by-laws, formed an agreement, pursuant to R. S. O., c. 205, s. 30, as amended by 42 Vict. c. 34, s. 32, which could not be rescinded by one of the municipalities without the concurrence of the other; and therefore that the repealing by-law should be passed only upon the petition of two-thirds of the ratepayers. *Re Wolberton and the Townships of South and North Grimsby*, 3 O. R., Q. B. D. 293.

On the 29th April, 1878, the board of education of the incorporated village of Morrisburgh, which was formed by the union of the high school board of high school district No. 4 of the

united counties of Stormont, Dundas, and Glengarry, and the public school board of the incorporated village of Morrisburgh, in which village the high school was situated, resolved that the sum of \$7,000 should be levied on high school district No. 4, to cover the expense of building, furnishing, &c., for purposes of the high school:—Held, that the joint board, and not the high school board, was the proper body to make the requisition for the money, under 37 Vict. c. 27, s. 63; adopting the construction put upon that section in *Re Perth*, 39 Q. B. 34, which had been confirmed by implication by 42 Vict. c. 34. *Re Board of Education of the Village of Morrisburgh and the Municipal Corporation of the Township of Winchester*, 8 A. R. 169.

The county council of the united counties, acting under 37 Vict. c. 27, s. 38, which gave power to every county council from time to time to determine the limits of a high school district for each high school existing in the county and within its municipal jurisdiction, had, on 23rd June, 1876, by by-law No. 516 declared that district No. 4 should consist of the village of Morrisburgh and the townships of Williamsburgh and Winchester. Sec. 38 was repealed by 40 Vict. c. 16, s. 18, which, however, declared that all high school districts which existed at the time of its passing (viz., 2nd March, 1877), should continue until the county council should think fit to discontinue them. On 12th October, 1877, the county council passed by-law No. 551 in which, after reciting, *inter alia*, that it was expedient to consolidate all acts and by-laws of those counties which in any way related to high school districts, proceeded in direct terms to repeal several by-laws including No. 516, and then went on to enact that the united counties should be divided into five districts for high school purposes. No. 4 and No. 5 being in the county of Dundas, and No. 4 embracing Williamsburgh, Winchester, and Morrisburgh:—Held, that although the reconstruction of the districts was ultra vires and void, because the power to determine the districts had ceased at the passing of 40 Vict. c. 16; yet the repeal of by-law 516, being within the power to discontinue the districts which that statute preserved, was valid, and the township of Winchester had therefore ceased to be part of district No. 4 before the resolution of April, 1878, was passed. *Id.*

The board of education, acting under the resolution of April, 1878, had on 19th July, 1878, made a demand upon the township of Winchester for its proportion of the money required. Before that demand was made another by-law, No. 590, had been passed on 22nd June, 1878, by the county council, repealing that portion of by-law No. 551, which related to high school districts for high school purposes in the county of Dundas, and enacting, *inter alia*, that district No. 4 should embrace the village of Morrisburgh only. This by-law was passed after a majority of the reeves and deputy reeves of the county of Dundas had, under the power given by 41 Vict. c. 15, requested the county council to abolish the districts Nos. 4 and 5, and to constitute the corporation of the village of Morrisburgh high school district No. 4:—Held, that this by-law was effectual to abolish district No. 4, if that district had continued to exist after the passage of by-law No. 551. *Id.*

When the demand was made in July, 1878, by-law 590 was in force. It was moved against in the Court of Queen's Bench in November, 1878, and was quashed so far as it assumed to determine the limits of districts, but not so far as it repealed by-law No. 551 : (*Chamberlain v. Stormont*, 45 Q. B. 26.) On 27th June, 1879, the county council passed another by-law No. 617, simply abolishing the existing high school districts in the county of Dundas. At this time no part of the money demanded had been levied. This by-law was passed after the rule nisi for a mandamus in the matter had been granted, but before it was argued : — Held, agreeing with Galt, J., who had discharged the rule nisi for a mandamus and with Hagarty, C. J., who dissented from the judgment of the majority of the Court of Queen's Bench, 45 Q. B. 460, that if the demand had been originally valid, it could not be enforced after the passage of by-law No. 617, and nothing would have remained in question but the costs of the application. *Ib.*

VIII. MISCELLANEOUS CASES.

To a bill by a rural school section corporation to compel the municipality to make good money paid by the municipality to a person alleged not to be the duly appointed officer of the corporation, the treasurer of the municipality is not a proper party. *School Trustees of the Township of Hamilton v. Neil*, 28 Chy. 408.

Moneys appropriated for educational purposes not protected by township treasurer's bond. See *The Corporation of the Township of Oakland v. Proper et al.*, 1 O. R., Chy. D. 330, p. 484.

QUALIFICATION.

- I. OF JUSTICES OF THE PEACE—See JUSTICES OF THE PEACE.
- II. OF MEMBERS OF MUNICIPAL COUNCILS—See MUNICIPAL CORPORATIONS.
- III. OF MEMBERS OF PARLIAMENT—See PARLIAMENTARY ELECTIONS.
- IV. OF VOTERS—See PARLIAMENTARY ELECTIONS.

QUARANTINE.

See HUSBAND AND WIFE.

QUEBEC.

Under 22 Vict. c. 5, s. 58, "consolidated in C. S. L. C. c. 83, s. 53, sub-s. 2, a judgment may be recovered in the province of Quebec, on a personal service in Ontario, in an action in which the cause thereof arose in Quebec, so as to render such judgment conclusive on the merits. A note made in Ontario, payable at a particular place in Quebec, is a contract deemed to be made in Quebec, the place of performance, and under C. S. C. c. 57, s. 4, is payable at the place named therein, the C. S. U. C. c. 42, requiring the use of the restrictive words, "not otherwise

or elsewhere," applying only to notes made and payable in Ontario. The note in this case was made in Toronto, payable at the Mechanics' Bank, Montreal, and was sent to Montreal, and there held until maturity, when it was presented for payment and dishonoured :—Held, that the contract being performable in Quebec, and the breach occurring there, the cause of action arose there, so as to bring the defendant within the operation of 22 Vict. c. 5, s. 58, and to make a judgment recovered against him in Quebec, on a personal service in Ontario, conclusive on the merits; and the defendant was therefore precluded from setting up a defence on the merits, and was allowed to except to the jurisdiction only. Quære, whether the personal service referred to in R. S. O. c. 50, s. 145, refers to personal service in Quebec. *Court v. Scott*, 32 C. P. 148.

Partnership Articles. Ownership of Plant. Law of Quebec. See *Macdonald v. Worthington et al.*, 7 A. R. 531, p. 582.

QUEEN'S BENCH.

See HIGH COURT OF JUSTICE.

QUEEN'S COUNSEL.

See BARRISTER-AT-LAW.

QUIETING TITLES ACT.

- I. PETITION, 666.
- II. EFFECT OF CONVEYANCE BY PETITIONER AFTER PETITION FILED, 666.
- III. EVIDENCE.
 1. *Abstract*, 667.
 2. *Other Cases*, 667.
- IV. OUTSTANDING CLAIMS, 667.

I. PETITION. |

A contestant under the Quieting Titles Act must file a petition in his own name before a certificate can issue in his favour, but he may use on such petition the evidence adduced on the petition in which he was contestant. *Re Dunham*, 8 P. R. 472.—Blake.

Where pending the investigation of the title, the petitioner laid out the land in village lots and registered a plan :—Held, that the petition must be amended in accordance with the plan. *Re Morse*, 8 P. R. 475.—Blake.

See *Re Pellen*, 8 P. R. 470, p. 667.

II. EFFECT OF CONVEYANCE BY PETITIONER AFTER PETITION FILED.

Parties to whom land has been conveyed after the registration of the certificate of the filing of the petition, and pending the investigation of the title, must be substituted as petitioners. *Re Cummings*, 8 P. R. 473.—Proudfoot.

III. EVIDENCE.

1. *Abstract.*

Registrars' abstracts must be continued to the date of the certificate of title. *Re Cummings*, 8 P. R. 473.—Proudfoot.

Where in a petition under the Quieting Titles Act it was shewn that the registrations on the whole lot, of which the land in question formed a part, numbered over 560, and that it would take six months and cost \$100 to prepare an abstract:—Held, that the abstract might be dispensed with, if the affidavit of a Provincial Land Surveyor were filed, proving that he had examined all the registrations on the lot, and that only certain specified numbers affected the land in question. *Re Morse*, II, 8 P. R. 477.—Blake.

2. *Other Cases.*

Where there was no evidence to shew that infants had been served with a decree of foreclosure, reserving to them a day to shew cause on attaining their majority, but it was shewn that they had been served with notice of proceedings under the Quieting Titles Act, proof of service of the decree was dispensed with. *Re Gilchrist*, 8 P. R. 472.—Blake.

Where a petitioner under the Quieting Titles Act claimed title as devisee of certain land, but the description of the land in the will was different to that of the land which he claimed:—Held, that he might establish a title shewing a misdescription in the will. But where a misdescription occurred in a deed:—Held, that the petitioner had merely established an equity to have the deed reformed, and that under the Act the court could not declare the title as though the deed had in fact been reformed. *Re Callaghan*, 8 P. R. 474.—Full Court.

When a petitioner under the Quieting Titles Act claimed title through a vesting order made upon a sale under a decree in an administration suit:—Held, under *Gunn v. Doble*, 15 Chy. 665, that in the absence of proof to the contrary, the order should be assumed to be regular, and that it was unnecessary to give evidence shewing title. *Re Morse*, 8 P. R. 475.—Blake.

See *Re Dunham*, 8 P. R. 472, p. 666.

IV. OUTSTANDING CLAIMS.

Where a petitioner under the Quieting Titles Act has only an estate in fee in remainder, the consent of the tenant for life must be obtained before the petition can be filed. *Re Pelten*, 8 P. R. 470.—Blake.

Where the title of a petitioner under the Quieting Titles Act was established except as to an undivided one-fifth interest in the bare legal estate, which appeared to be outstanding in an infant:—Held, such interest must be got in by the petitioner, or be declared in the certificate of title to be outstanding. *Re Raynerd*, 8 P. R. 476.—Proudfoot.

QUO WARRANTO.

See MUNICIPAL CORPORATIONS;

RAILWAYS AND RAILWAY COMPANIES.

I. POWERS OF DOMINION AND PROVINCIAL LEGISLATURES—See CONSTITUTIONAL LAW.

II. LANDS AND THEIR VALUATION.

1. *Lands Taken.*

- (a) *Government Lands*, 669.
- (b) *Infant's Estate*, 670.
- (c) *Estate of Remainderman*, 670.
- (d) *Other Cases*, 671.

2. *Lands Granted on Condition.*

- (a) *Erecting Stations*, 673.
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1. *Highways.*

- (a) *Railways Running on*, 676.
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IV. INJURIES TO PERSONS AND CATTLE.

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VI. CARRIAGE OF GOODS.

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IX. BONDS.

1. *Right of Bondholders to Register and Vote*, 686.

X. AID TO RAILWAY COMPANIES BY MUNICIPALITIES, 688.

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XIV. SPECIAL ACTS RELATING TO PARTICULAR COMPANIES.

1. *Canada Atlantic Railway Company*, 691.

2. *Canada Central Railway Company*, 692.

3. *International Bridge Company* — See INTERNATIONAL BRIDGE COMPANY.

XV. TRAMWAY—See TRAMWAY.

II. LANDS AND THEIR VALUATION.

1. Lands taken.

(a) Government Lands.

Semble, that in the case of railway companies within the exclusive jurisdiction of the Dominion Parliament, it has the power to confer upon such companies the right of constructing their lines through the crown lands of the several provinces through which they may pass, without any restriction as to obtaining the consent of the lieutenant-governor in council. *Booth v. McIntyre et al.*, 31 C. P. 183.

The Ontario, Simcoe, and Huron Railway Company, (afterwards changed to "The Northern Railway of Canada,") in the course of the construction of their roadway, acting in assumed and alleged pursuance of the powers conferred on the company by its charter, entered upon and took possession of certain government lands held by the principal officers of Her Majesty's ordnance for ordnance purposes, and proceeded to construct their road thereon. Afterwards negotiations were opened between the company and the principal officers for acquiring such right of way, in the course of which numerous letters passed between the parties and between the several departments connected with the ordnance department, from which it appeared that the parties concerned had arrived at the conclusion that the company were acting within their statutory powers, and that all the department could require was compensation for the land taken. Subsequently all these lands were, by the imperial government ceded to the government of Canada, and in the year 1875 it was ascertained that the sum for which the government held a lien upon the road amounted to about £600,000; and by an Act of the legislature of that year that claim was compromised by the government for £100,000 sterling which was paid. In the year 1856 or 1857, this company agreed with the Grand Trunk Railway Company for the use of a portion of this land for the purposes of the line of the latter company, who it was shewn had entered upon and continued in the use of this land until 1879, when the Credit Valley Railway Company, with a view of obtaining an entrance into the city of Toronto, entered upon this tract of land, and were proceeding to construct their line of road thereon. Upon a bill filed by the Grand Trunk Railway Company an interlocutory injunction was granted to restrain the further construction of the Credit Valley Railway, until the hearing, when the injunction was made perpetual, the court being of opinion that the Northern Railway Company, under their dealings with the board of ordnance, and under the various statu-

tory enactments appearing in the case, had acquired an absolute title to the land in question, free from any lien in respect thereof. *The Grand Trunk R. W. Co. v. The Credit Valley R. W. Co.*, 27 Chy. 232.

See *Attorney-General v. Midland R. W. Co.*, 3 O. R. 511, p. 672.

(b) Infant's Estate.

The mother of infant children, resident with her, being entitled to a third undivided interest in the land, they owning the residue, by deed agreed with a railway company, in consideration of an extension by them of their line of railway from R. to P., and for one dollar to grant to them in fee the right of way "through my land in P., consisting of such portion of lots 18 and 19 as may be required to carry the railway across said lots," and conveyed to them accordingly. At the time of the conveyance she had not been appointed guardian to her children:—Held, that under the Railway Act of 1863, (31 Vict. c. 68, s. 9, sub-ss. 3, 9, D.,) her deed barred the children's interest in the land as well as her own, and that they were therefore not entitled to compensation from the company. *Dunlop v. The Canada Central R. W. Co.*, 45 Q. B. 74.

(c) Estate of Remainderman.

A railway company paid to tenants for life the full price of the land conveyed by them to the company for their line of railway, and on the cesser of the life-estate the parties entitled in remainder filed a bill stating that the railway company assumed to purchase the lands for the right of way; that the company alleged that they had paid the full consideration for the land to the tenants for life; submitting that even if the company did make such payment they did so in their own wrong, and asking for payment of the plaintiffs' share of the purchase money:—Held, that the statement that the company "alleged" that the purchase money was all paid to the vendors was not such a positive statement of the fact of payment to the tenants for life as to make them proper parties to the bill, and a demurrer was allowed on this ground. *Owston v. Grand Trunk R. W. Co.*, 23 Chy. 423.

An "action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come to the hands of another." Therefore, where a railway company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the company for the purposes of their road, and subsequently the remainderman filed a bill against the company and the representatives of the tenant for life, seeking to obtain payment from the company of the proportion of purchase money payable to the remainderman:—Held, that the executors were properly made parties with a view to the company obtaining relief over against them in the event of the company being compelled to make good the money in the first instance, and a demurrer by the executors was overruled with costs, on the ground that the company were entitled to a remedy over against them for the amount overpaid them, and on the additional ground that the bill alleged all facts necessary to entitle the plaintiffs to a direct de-

cree against them, although the bill was not framed with a view to a direct remedy against the executors; for "the payment being made by the company to the executors * * * of money to a proportion of which the plaintiffs were entitled, and the payment being made without the authority of the plaintiffs it became money had and received by the executors to the use of the plaintiffs." *S. C. Ib.* 431.

(d) *Other Cases.*

There is a distinction between the rights conferred upon municipal corporations and railway companies respectively to expropriate property, the former existing for the public good, the latter being commercial enterprises only. The charters of the latter are therefore more rigidly construed than are the powers of a municipal corporation. *Hurding v. The Corporation of the Township of Cardiff*, 29 Chy. 308.

The City of Ottawa, passed resolutions providing for a lease of right of way to the Canada Atlantic Railway Company over lands expropriated by the city for water-works purposes, under 35 Vict. c. 80 (O):—Held, that though *prima facie* the only right intended to be conferred on a company is that of expropriating the private property of individuals or corporations, and not property already devoted to public uses, or already expropriated under other Acts, yet under some circumstances the right to make such expropriation might exist, and if so, then the city would have the corresponding power to convey; and as the applicant had not shewn to the court that circumstances did not exist under which the railway company could take the land, the court would not assume that the city had committed a breach of trust in passing the resolutions:—Held, also, that there was nothing in the resolutions authorizing the railway to cross the streets at a grade different from that prescribed by the Railway Act of 1879. *In Re Bronson et al. and the Corporation of the City of Ottawa*, 1 O. R., Q. B. D. 415.

S., being the owner of lands through which the defendants desired to build their road, agreed to give them the right of way, and the company, with his written permission, took possession without compensation and constructed their road, and had up to this time been in uninterrupted possession for more than ten years. The plaintiff, claiming under S., now demanded compensation and obtained a *mandamus nisi* to proceed to arbitration under the Railway Act, 1868:—Held, affirming the judgment of Galt, J., that the plaintiff was not entitled; that S. having the right to accept any or no compensation, and having elected to take none, the company then became entitled to the lands, and the plaintiff could not succeed. Per Galt, J. The ten years possession of the company had extinguished the title of S. and those claiming under him, and vested it in the company. *Thompson v. Canada Central R. W. Co.*, 3 O. R., Q. B. D. 136.

In an action by the Attorney-General, upon the relation of the bursar of Toronto University, to recover possession of certain lands claimed to be vested in Her Majesty for the benefit of the university, the defendants pleaded that the said lands had been, with the assent of the university and bursar, taken possession of by them for the

purposes of their railway under their statutory powers, and that they had since retained and then were in possession thereof, and they also pleaded the Statute of Limitations:—Held, on demurrer, that it was not necessary to set out specifically the statutes alluded to, in the various proceedings connected with the expropriation of the land, and the defence was not objectionable, upon demurrer, on the ground of want of certainty, by reason of its merely general allegation of compliance with the statutory requirements:—Held, also, that the mere allegation that the defendants were in possession afforded a good defence in law in such an action, and put the plaintiff to the proof of his cause of action, under Rule 144:—Held, also, that even if under R. S. O. c. 165, the assent of the Lieutenant-Governor in Council to the expropriation of the lands by the railway was necessary, which it was not, yet after a user of the land by the railway for ten years, coupled with legislative recognition of the status of the railway company, and with the fact that the taking of it was with the assent of the university, and colleges, and bursar, the formal assent of the Crown must be held to have been dispensed with, and trespass or ejectment would not lie:—Held, also, that the Statute of Limitations was no bar to the action, although brought by the Crown in its capacity as trustee of the land in question. *Regina v. Williams*, 19 Q. B. 397, followed. *Attorney-General v. The Midland R. W. Co.*, 3 O. R., Chy. D. 511.

The P. & C. L. R. Co., incorporated in 1855, by 18 Vict. c. 194, had acquired the land in question as part of their road bed. In 1865, its charter expired, the road not having been put in operation. In 1866, 29-30 Vict. c. 98, was passed, by which the road was to be sold at auction, the Act of Incorporation was revived, and the time for completing the railway extended for five years from the passing of the Act, and there was a further provision for sale under order of the Court of Chancery. Within the five years a conveyance was executed to the defendant company, which took possession, but did not use the land till a short time before the suit. In 1872, the C. P. & M. R. & M. Co. filed a map and book of reference of a proposed extension of their line over the land in question, and constructed part of their road thereon, but ceased in 1873. In 1880, under 43 Vict. c. 54, O., the C. P. & M. R. & M. Co., leased to the plaintiff company the land in question, and this action was brought to recover possession thereof:—Held, affirming the judgment of the court below, that the partial construction of their road by the C. P. & M. R. & M. Co. in 1872, was an act of trespass: that the defendant company under the reviving Act and conveyance in pursuance thereof acquired a title to the land: that the power to sell by order of the Court of Chancery was permissive merely: that their right to the land was not forfeited by non-completion of the work on the land within the five years, and therefore that the plaintiff company should not succeed. The deed to the defendant company described it by its original name of P. H. L. & B. R. Co., when in fact its name had then been changed:—Held, a sufficient descriptive personæ, to enable the company to take, though it might not be sufficient to sue in. *Grand Junction R. W. Co. v. Midland R. W. Co.*, 7 A. R. 681.

Expropriation of mining lands.—Injunction. See *Jenkins et al. v. The Central Ontario R. W. Co.*, 4 O. R. 593, p. 344.

2. Lands Granted on Condition.

(a) Erecting Stations.

An engineer of the defendants, whose duty it was to obtain transfers of land and determine the situation of station houses, procured from the plaintiffs, for nominal considerations, grants of land for a station house and ground, representing that the station would be put, as desired by the plaintiffs, at a certain point advantageous to both. The deed of the plaintiff S. contained this proviso: "Provided that the said company, their successors and assigns, do erect and maintain on the said lands a station for the accommodation of passengers and freight, and name the same B." The station was erected on the land in the deed containing this proviso, but not at the point represented:—Held, that though the plaintiffs had the expectation that the station would have been placed where they desired, yet there had been no deceit practised by the defendants' engineer for the purpose of obtaining the grants of the land: that the engineer had no power to bind the defendants to such a thing; and that the defendants had done all they were bound to do by observing the proviso in the deed, which called for the erection of the station house on the lands without specifying any particular point. *Schliehauf et al., v. Canada Southern R. W. Co.*, 28 Chy. 236.

The plaintiff agreed with contractors for the building of a railway to convey to them in fee simple six acres, to be increased to ten if necessary, in consideration of their placing the station for the town of Prescott thereon. After the road had been surveyed and the station buildings erected on the property, the plaintiff executed a conveyance thereof to the contractors which contained a covenant by them to continue and maintain the station on those lands from thenceforth, but the deed was never executed by the grantees. The company continued to use such station for about ten years, when they removed it to a distance of one and a-half miles:—Held, reversing the judgment of the Court below (28 Chy. 583), that the act of the company in thus placing and using the station was a substantial compliance with the agreement, and that they were not bound to continue that station there for all time. Per Hagarty, C. J. Semble, that upon the defendants ceasing to use the lands for the purpose for which alone they had been conveyed, the grantor would be at liberty to resume possession. Per Patterson, J. A. That even if the plaintiff were entitled to claim such possession in consequence of the company ceasing to use the land for the purpose for which alone it had been conveyed, the fact that the company had resumed the use and occupation during the progress of the cause would be considered a material fact upon an application to alter the frame of the bill in order to ask that relief; and under the prayer for general relief the Court would not determine that the plaintiff was entitled to re-enter, even though facts apparently sufficient to justify such a decree might be alleged in the pleadings and deducible from the evidence. The proper form of conveyance that should have

been used for effecting the plaintiff's purpose suggested. *Jessup v. Grand Trunk R. W. Co.*, 7 A. R. 128.

See *Clouse v. Canada Southern R. W. Co.*, 4 O. R. 28, *infra*.

(b) Farm Crossings.

A deed conveying a right of way to the defendants in 1869, contained the following stipulation: "The company to make and maintain a farm crossing, with gates at the present farm lanes, the fence at crossing to be returned as much as possible." R. the company's engineer, treated for the conveyance, but had no power to agree for a second crossing, though it was said he had promised if he should find a second crossing necessary he would, so far as in him lay, get it done, and the deed was executed upon this understanding:—Held, (reversing the decree of Proudfoot, V. C., 27 Chy. 95,) that the defendants could not be compelled to make a second crossing for use in winter; and that, upon the construction of the words above set forth, they were bound to continue the crossing, not close it up or impair it or alter its character as a farm crossing, but were not obliged to keep it free from snow. Proudfoot, V. C., dissenting. *Cameron v. Wellington Grey and Bruce R. W. Co.*, 28 Chy. 327.

Where the defendants, a railway company, through their right of way agent, purchased certain land for the railway from the plaintiff, and verbally agreed with him at the time to make and maintain certain over and under crossings across the railway to be built on the land so purchased, whereupon the plaintiff conveyed the land to them, for a less sum than he otherwise would have done, and for more than ten years the defendants maintained the crossings as agreed, but afterwards caused some to be filled up or obstructed:—Held, that, whether the agent had authority to make such an agreement or not, the plaintiff was entitled to damages and an injunction to restrain the defendants from interfering with the crossings, for the company had recognized the agreement, and adequate compensation could not be given to the plaintiff in damages, and, moreover, farm crossings, when once made by a railway company, must, under C. S. C. c. 66, s. 13 et seq., which was incorporated in the defendants' charter, be maintained by it, and this independently of any agreement for permanent maintenance, although it is otherwise as to stations:—Held, also, that 41 Vict. c. 27, D., does not give the mortgagees, under the arrangement sanctioned thereby, any power to destroy a farm crossing given in consideration of the purchase of land by the railway, or authorize them to interfere with rights which the railway company are bound to respect. Semble, that public convenience could not prevail over the plaintiff's private rights. Semble, also, that agents for the purchase of the right of way for railways, have, as naturally incident to their appointment as such agents, power to agree what crossings shall be given: *Jessup v. Grand Trunk R. W. Co.*, 7 A. R. 128, and *Schliehauf et al. v. Canada Southern R. W. Co.*, 28 Chy. 236, distinguished. *Clouse v. Canada Southern R. W. Co.*, 4 O. R., Chy. D. 28. This case has been carried to appeal.

See *Fargey v. The Grand Junction R. W. Co.*, 4 O. R. 232, p. 690.

3. Compensation.

Where, a railway company in the construction of their road took possession of and built their road across a plot of land of the plaintiff, who instituted proceedings to compel payment therefor, and under the decree a sum of \$1,800 was found to be the value of such plot, which sum together with interest and costs, was paid by the company in order to prevent the land being purchased by a rival company; and three years afterwards they applied on petition to have a portion of such purchase money refunded, on the ground that another railway company, whose rights had been assigned to them, had previously paid a prior owner of the land for a portion thereof:—The court (Ferguson, J.) refused the relief asked with costs, on the ground, amongst others, that the company, had they exercised due diligence in the matter, might have become aware of such prior purchase and payment. *Dumble v. The Cobourg and Peterboro R. W. Co.*, 29 Chy. 121.

See *Dunlop v. The Canada Central R. W. Co.*, 45 Q. B. 74, p. 670; *Owston v. Grand Trunk R. W. Co.*, 28 Chy. 428, S. C. 1b. 431, pp. 670, 671; *Thompson v. Canada Central R. W. Co.*, 3 O. R. 136, p. 671; *Norvell v. The Canada Southern R. W. Co.*, 5 A. R. 13, p. 676.

See also II. 2, p. 673.

4. Order for Immediate Possession.

Semble, that the powers conferred on the county judge under the Railway Act of Ontario, R. S. O. c. 165, s. 20, sub-s. 23, of ordering immediate possession, before arbitration had, do not exclude the jurisdiction of this court to enjoin the taking of possession, if the company is making use of its powers to attain any object collateral to that for which it was incorporated; but otherwise it is not within the jurisdiction of a judge of this court to interfere with an order of a county judge, though granted *ex parte*. *Jenkins et al. v. The Central Ontario R. W. Co.*, 4 O. R., Chy. D. 593.

5. Reference and Award.

(a) Desistment.

Held, that a railway company having desisted once from their notice to take land, given under R. S. O. c. 165, s. 20, could not again desist, pending an arbitration proceeding, under a second notice. The company's arbitrator having withdrawn from such arbitration, in deference to a notice of desistment given by the company, after the amount to be awarded had been agreed upon by the other two:—Held, that the company could not object to the award on the ground that the company's arbitrator had not been asked to sign it. *Moore v. The Central Ontario R. W. Co.*, 2 O. R., Q. B. D. 647. This case has been carried to appeal.

[See 47 Vict. c. 30, s. 11.]

(b) Objections to Award.

The court has no jurisdiction to set aside an award made under the Railway Act of 1868 (31 Vict. c. 28, D.); but held, that even were there jurisdiction the court would not have inter-

fered in this case, as the instrument in question was in no sense an award under the statute, the provisions of the statute not having been observed, there having been only two arbitrators appointed, who had not been sworn, and subsec. 26 of sec. 9, not having been complied with. *In re Horton and Admaston and Canada Central R. W. Co.*, 45 Q. B. 141.

Held, affirming the decree of Prondfoot, V. C., that the plaintiff was entitled to specific performance of an award giving him damages for his lands taken by the defendants; that the sum awarded was not so excessive as to shew any fraudulent or improper conduct on the part of the arbitrators; and Quære, whether, if shewn, it would be a defence in such a proceeding:—Quære, also, the land having been taken under an Act of the Dominion Parliament, whether the finding of the arbitrators could be reviewed under the statute of Ontario, 38 Vict., c. 15. *Norvall v. Canada Southern R. W. Co.*, 5 A. R. 13.

See also *Norvell v. Canada Southern R. W. Co. and Four other Cases*, 9 A. R. 310, 322.

See *Moore v. The Central Ontario R. W. Co.*, 2 O. R. 647, p. 675.

6. Power of Receiver to Acquire Right of Way.

See *Gooderham v. Toronto and Nipissing R. W. Co.*, 28 Chy. 212, p. 691.

III. CONSTRUCTION OF RAILWAYS.

1. Highways.

(a) Railways Running on.

A municipality may file a bill to compel a railway company to put streets and highways properly traversed by their line of railway in good repair, and will not be restricted to proceeding by indictment or information. *Fenelon Falls v. Victoria R. W. Co.*, 29 Chy. 4.

The plaintiffs, a municipal corporation, filed a bill seeking to restrain the defendants, a railway company, from trespassing by running their track along one of the streets of the municipality without the consent thereof, thus impeding traffic, in contravention of the Railway Act, C. S. C. c. 66, s. 12, sub-s. 1:—Held, that by virtue of the Municipal Act there is such power of management, control, &c., bestowed upon municipalities, and such a responsibility cast upon them as to justify them in intervening on behalf of the inhabitants for the preservation of their rights:—Semble, but for the language used in *Guelph v. The Canada Co.*, 4 Chy. 656, the proper frame of the suit would have been by way of information in the name of the attorney-general, with the corporation as relators. *Id.*

Per Armour, J., the jury were rightly directed, under the facts stated in the report, that the defendants had laid down the track, on which the accident happened, in the city of Ottawa, without authority, it being a third track or switch for use in connection with their station, for purposes of shunting, &c., and if illegally laid down no acquiescence, except by by-law, would make it rightful as against the plaintiff. Per Hagarty, C. J. Having been there for many years with the knowledge and acquiescence of the corporation, its existence could not alone make defen-

dants liable, but it was properly left as a circumstance to be considered by the jury. *Lett, administrator of Lett v. The St. Lawrence and Ottawa R. W. Co., and Hinton v. The St. Lawrence and Ottawa R. W. Co., 1 O. R., Q. B. D. 545.* This case is in appeal.

Where a railway company constructed their railway along a highway in a municipality, the council whereof were not formally applied to for leave, but subsequently passed a resolution notifying the railway company to fill up the ditch existing on both sides of the railway, and to put down proper crossings:—Held, that the corporation had thereby admitted that the railway company were lawfully in occupation of the highway, and could not afterwards object. *The Corporation of the Township of Pembroke v. The Canada Central R. W. Co., 3 O. R., Chy. D. 503.*

The leave of the municipal or local authorities required by 31 Vict. c. 68, D., before a railway is carried along an existing highway, may be granted at any time whether before, during, or after the construction of the railway, and need not necessarily be given by by-law:—Semble, that R. S. O. c. 174, s. 277, enacting that the powers of township councils shall be exercised by by-law, must be construed as referring only to the exercise of powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another legislature. *Ib.*

Held, also, that the corporation having stood by while the railway was constructed, and subsequently for upwards of five years, while it was in operation, and having also by the resolution aforesaid, procured further expenditure by the company, were bound by acquiescence, and could not now maintain an action for the removal of the railway from the street. A corporation may be bound by acquiescence as an individual may:—*Quære*, whether such acquiescence would have availed as a legal justification for the defendants on an indictment for a nuisance at the suit of the Crown. *Ib.*

(b) Bridges Over.

See *Gibson v. The Midland R. W. Co., 2 O. R. 658, p. 681.*

(c) Fences.

The plaintiff sued the defendants for the loss of certain cattle which had escaped to their road by reason, as he alleged, of the neglect of the company to fence, and were killed by their train. It appeared that the plaintiff owned land on either side of the defendants' railway, but the Toronto, Grey, and Bruce R. W., which lay to the north of defendants' railway, and had also been taken from his farm, ran between his land and defendants' railway:—Held, upon the facts stated in the report, that there was no evidence that the cattle had reached the railway from the south side; and the fact that the Toronto, Grey, and Bruce R. W. Co. had neglected to fence did not give the plaintiff, in respect of the occupation of their land by his cattle, the status of that company for the time, as adjoining proprietors, against whom only the defendants were

bound to fence, so as to make the defendants liable. *Douglass v. The Grand Trunk R. W. Co., 5 A. R. 585.*

(d) Gates.

The defendants' line of railway ran through the plaintiff's farm, and the plaintiff's mare escaped from a field adjoining the railway through a gate opposite a farm-crossing which the defendants had constructed, and which was out of repair, and was killed on the railway:—Held, that it was the duty of the defendants to keep the gate in repair, and that they were liable, whether they were bound to construct such farm-crossing or not. *Murphy v. The Grand Trunk R. W. Co., 1 O. R., Q. B. D. 619.*

(e) Farm Crossings.

See Sub-head II. 2, (b) p. 674.

2. Packing Frogs of Rails.

See *Monkhouse v. The Grand Trunk R. W. Co., 8 A. R. 637, p. 682.*

IV. INJURIES TO PERSONS AND CATTLE.

1. At Intersection of Railways.

The Grand Trunk Railway crosses the Great Western Railway, about a mile east of the city of London, on a level crossing. On 19th June, 1876, a Grand Trunk train, on which plaintiff was on board as a conductor, before crossing, was brought to a stand. The signal man, who was in charge of the crossing and in the employment of the Great Western Railway Company, dropped the semaphore, and thus authorized the Grand Trunk train to proceed, which it did. While crossing the track, appellants' train, which had not been stopped, owing to the accidental bursting of a tube in air-brakes, ran into the Grand Trunk train and injured plaintiff. It was shewn that these air-brakes were the best known appliances for stopping trains, and that they had been tested during the day, but that they were not applied at a sufficient distance from the crossing to enable the train to be stopped by the hand-brakes, in case of the air-brakes giving way. C. S. C. c. 66, s. 142, (R. S. O., c. 165, s. 90) enacts that "every railway company shall station an officer at every point on their line crossed on the level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof, that the way is clear." Sec. 143, enacts that "every locomotive * * * or train of cars on any railway shall, before crossing the track of any other railway on a level, be stopped for at least the space of three minutes:—Held, that the appellants were guilty of negligence in not applying the air-brakes at a sufficient distance from the crossing to enable the train to be stopped by hand-brakes in case of the air-brakes giving way. That there was no evidence of contributory negligence on the part of the Grand Trunk railway, as they had brought their train to a full stop, and only proceeded to cross appellants' track when authorized to do so by the officer in charge of the semaphore, who was a

servant of the Great Western Railway Company. *The Great Western R. W. Co. of Canada v. Brown*, 3 S. C. R. 159. Affirming *S. C. 2 A. R. 64*; 40 Q. B. 333.

2. At Road Crossings.

Held, that a mere track crossing, on a road or way on a railway company's own grounds for the convenience of passengers and others in going to and from the station on railway business, is not a public crossing, highway, or place, within C. S. C. c. 66, s. 104, so as to subject the company to the requirements of that section of ringing the bell or sounding the whistle when approaching such crossing; but, semble, apart from the statute, care must be taken when starting their engines from the station. *Bennett v. The Grand Trunk R. W. Co.*, 3 O. R., C. P. D. 446. See *S. C. 7 A. R. 470*, p. 680.

The respondents, the plaintiffs in the court below, were lawfully driving in their carriage along the highway, and when within about 116 feet of the crossing of appellants' railway a train passed, which frightened the horse causing it to turn and upset the vehicle, by which the plaintiffs sustained serious injury. It was shewn that the driver of the locomotive had omitted to give the usual statutory signal, by whistling or ringing a bell, when at a distance of eighty rods from such crossing. In an action brought against the railway company a verdict was found in favour of the plaintiffs, which the Common Pleas Division, 32 C. P. 349, (Wilson, C. J., dissenting) refused to set aside. On appeal this judgment was affirmed, and the appeal dismissed with costs (Burton, J. A., dissenting.) Per Burton, J. A., the general words used in the statute must, having regard to the general provisions thereof, be intended only for those actually crossing the railway and injured when so crossing, or who in the exercise of reasonable diligence and care, but in endeavouring to escape peril, have sustained injury. The sounding of the whistle or the ringing of the bell was intended as a warning only to those about to cross the track of the railway. *Rosenberger v. Grand Trunk R. W. Co.*, 8 A. R. 482. Affirmed by the Supreme Court.

The train was backing at the time the accident happened. Per Armour, J. The jury were rightly directed that defendants were bound to sound the whistle or ring the bell, when the nearest part of the train was eighty rods from the crossing; and having regard to the fact that they had without authority increased the number of tracks there, it was also right to tell them that it was for them to say whether, considering the nature of the crossing, they should not have stationed a man there, or taken some other than the statutory precautions. *Lett, Administrator of Lett v. The St. Lawrence and Ottawa R. W. Co. and Hinton v. The St. Lawrence and Ottawa R. W. Co.*, 1 O. R., Q. B. D. 545. This case is in appeal.

3. Running Reversely.

Semble, that sec. 165 of C. S. C. c. 66, requiring a person to be stationed on the last car in the train, applies to the station grounds of rail-

way companies in cities, towns, and villages, as well as to the limits outside of such station grounds. *Bennett v. The Grand Trunk R. W. Co.*, 3 O. R., C. P. D. 446.

The defendants were required by law to station a man on the last car of every train moving reversely in any town, to warn persons standing on or crossing the track of the approach of the train:—Held, that the defendants did not comply with this direction by having a man at the front end of the last car, where he could not see persons crossing the track. In this case there was no brake at the rear end of the last car. The brakeman on the last car, seeing the track clear a few minutes before the accident, went to the front end, and the plaintiff then attempting to cross, was injured:—Held, evidence of negligence to go to the jury. *Levoy v. Midland R. W. Co.*, 3 O. R., Q. B. D. 623.

See *Lett, Administrator of Lett v. The St. Lawrence and Ottawa R. W. Co., and Hinton v. The St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545, p. 679.

4. Contributory Negligence.

The servant of the plaintiff was in charge of an omnibus running to and from the station of the defendants' railway, and on the evening in question was attending at Georgetown station, at about ten feet from the track, but was unable to see along the railway in either direction by reason of houses intervening. By leaving the omnibus, however, and going to the track he could have seen an approaching train; but omitting to take this precaution, although aware that a freight train was then on the track near the crossing, he started off to cross it, and did not hear or see anything of the approaching train until within about four feet of him, when he was unable to avoid it, and the omnibus and harness were considerably damaged. It was not shewn that the driver of the train had given any warning of its approach by sounding the whistle or bell on its nearing the part of the track where it crossed the road to the station. At the trial the plaintiff was nonsuited on the ground of the contributory negligence of the plaintiff's servant:—Held, on appeal, reversing the judgment of the county court, that the question of contributory negligence had been improperly withdrawn from the jury, and that a new trial must be had in order to submit that question to them. *Bennett v. The Grand Trunk R. W. Co.*, 7 A. R. 470. See *S. C. 3 O. R. 446*, p. 679.

The plaintiffs, husband and wife, were on a train of the defendants, going to Lefroy. The conductor, before reaching the station, announced that the next station was Lefroy. On approaching the station the train, according to the plaintiff's witnesses, was slowed, but did not stop. The husband got off while the train was moving slowly, and his wife, seeing that the speed was increasing, and that they were passing the station, sprang after him, though he had let go of her hand, and told her not to jump, and was injured. It was left to the jury to say whether she had acted imprudently in so doing, and they found a verdict for the plaintiffs:—Held, that the question of contributory negligence was properly left to them, and the court

refused to disturb the verdict. *Edgar et ux v. Northern R. W. Co.*, 4 O. R., Q. B. D. 201. This case has been carried to appeal.

See *McLaren v. The Canada Central R. W. Co.*, 32 C. P. 324, p. 682.

5. Neglect to Repair Fences or Gates.

See *Murphy v. The Grand Trunk R. W. Co.*, 1 O. R. 619, p. 678: *Douglass v. The Grand Trunk R. W. Co.*, 5 A. R. 585, p. 678.

6. Damages.

The plaintiff sued under Lord Campbell's Act, on behalf of himself and his children, for the death of his wife, occasioned by the defendants. The wife had some separate estate from which she derived an income, but the jury allowed no damages in respect thereof. It was not shewn that the wife afforded any pecuniary assistance either to her husband or her children. The jury found for the plaintiff and apportioned the damages amongst the plaintiff and some of his children:—Held, Armour, J., dissenting, that the verdict was wrong; for the plaintiff was not entitled either for himself or the children to recover compensation for anything but pecuniary loss, or the loss of a reasonable probability of pecuniary benefit:—Per Armour, J. The loss to be compensated is the loss of some benefit or advantage capable of being estimated in money, as distinguished from a solatium for wounded feelings and loss of companionship; and the loss to the husband of the wife's performance of her household duties, and to the children of a mother's education, are both losses which can be estimated by a jury. *Lett, Administrator of Lett v. The St. Lawrence and Ottawa R. W. Co. and Hinton v. The St. Lawrence and Ottawa R. W. Co.*, 1 O. R., Q. B. D. 545. This case is in appeal.

The plaintiff, as administratrix, sued the defendants, under 44 Vict. c. 22, s. 7, O., for the death of her illegitimate son, a brakeman on the defendants' railway, who was killed by being carried against a bridge, not of the height required by that Act, while on one of their trains passing underneath it. The bridge belonged to another railway company, which had the right to cross the defendants' line in that way, and though the time allowed by the statute for raising the bridge had expired they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised, the bridge:—Held, that the plaintiff was not entitled to recover (1) because sec. 7 of the Act applies only to bridges within the control of the company whose servant has been injured, and (2) the Act was intended to give no greater right to recover than Lord Campbell's Act, and therefore the plaintiff's relationship to the deceased prevented her recovery. *Gibson v. Midland R. W. Co.*, 2 O. R., Q. B. D. 658.

7. Other Cases.

Plaintiff, while standing on the platform at one of defendants' stations, had his eye injured by the explosion of a fog signal, which had been placed on the track. The only evidence given was, that certain servants of defendants had

these fog signals in their possession for lawful purposes, but that no one to the knowledge of several of the defendants' employees, who were called as witnesses for the plaintiff, placed this one on the track, and that it was wholly unnecessary for defendants' purposes; and it appeared not impossible that it might have been obtained from defendants' servants by some third party, or might have been put there by a servant of defendants for a frolic:—Held, that a nonsuit was properly directed. *Jones v. Grand Trunk R. W. Co.*, 45 Q. B. 193.

The plaintiff, a workman employed by the Grand Trunk Railway Company, was injured while in discharge of his duties, by reason of his foot having been caught in one of the frogs of the rails, which was not packed in the manner prescribed by 44 Vict. c. 22 (O):—Held, that the Grand Trunk Railway being a Dominion Railway, and within sec. 92, No. 10 (a) of the B. N. A. Act, was not affected by the statute, which professed only to apply to railway companies in respect of which the Provincial Legislature had authority to enact such provisions; and therefore, that the defendants were not liable. *Monkhouse v. The Grand Trunk R. W. Co.*, 8 A. R. 637.

V. FIRE FROM ENGINES.

In answer to a question whether the plaintiff had been guilty of contributory negligence in piling his lumber so near the track, or by allowing the saw dust to remain on it, or by not having sufficient appliances to extinguish fire. If so, could the defendant by the use of ordinary care and diligence have prevented the injury, the jury answered: Not as to piling lumber or as to saw dust, but somewhat as to appliances. We think the defendants could have prevented the fire, and that the plaintiff is entitled to a verdict. The plaintiff it appeared had for many years piled his lumber upon defendants' land, with their assent, within a short distance of the track:—Held, that the plaintiff was not bound to provide appliances to guard against defendants' negligence. *McLaren v. Canada Central R. W. Co.*, 32 C. P. 324.

In an action of negligence for the destruction by fire of a quantity of lumber owned by the plaintiff, and which by leave of the defendants he had piled close to their track, caused, as the plaintiff alleged, by sparks emitted from the smoke stack of one of the locomotives belonging to the defendant company, the jury at the trial found that the fire was caused by the imperfect or defective construction of the smoke stack, the cone being placed too close to the netting, and by reason of the honnet rim not fitting sufficiently close to the bed. Upon a motion in banc to set aside the verdict entered for the plaintiff, the court, upon the evidence set out in the case (32 C. P. 324):—Held, that the finding of the jury was fully supported thereby, and on appeal to this court from that decision, the court being equally divided, the judgment was affirmed, and the appeal dismissed, with costs. After the occurrence of the accident which caused the destruction of the plaintiff's lumber, B. an engine driver of the defendants, and who was in charge of the locomotive (No. 5) on the day the fire occurred, made an entry in what was termed the

repairs-book, kept in the defendants' shops: "Bottom rim of bonnet in stack wants making tight * * Screen wanted in front of ash pan." At the trial B. was called as a witness on the part of the plaintiff, and proved his having made such entry in the usual course of his duties. Per Spragge, C.J.O., and Hagarty, C.J., such entry was properly produced and read to the jury. Per Burton and Patterson, J.J. A., such entry or report was merely a narrative of a past occurrence or something in the opinion of B. requiring attention, and in any view could only be receivable as evidence against the company, if at all, upon proof of B.'s death. With a view of shewing that engine No. 5 was defectively constructed, evidence was given that on previous occasions when it was in the same or an improved condition, it had thrown out sparks causing fires. Per Spragge, C. J. O., and Hagarty, C. J., such evidence was properly receivable:—Sembler—Per Spragge, C.J.O., and Patterson, J.A., although a party to a cause may be entitled to call for the production of documents, in order to obtain discovery, it does not follow that the contents of such documents are in themselves evidence. *S. C.*, 8 A. R. 564. Affirmed on appeal to Her Majesty in Council.

VI. CARRIAGE OF GOODS.

1. Liability Beyond Defendants' Line.

The plaintiff shipped goods from St. John's, Quebec, to Dundas, Ontario, to be carried from St. John's to Toronto by the Grand Trunk Railway Company, who delivered them to the Great Western Railway Company, who carried the same to Dundas, where the goods arrived in a damaged state. The plaintiff, being in doubt as to which company was liable, there having been a separate contract with each, joined both as defendants:—Held, affirming the order of Proudfoot, J., who had affirmed the order of Mr. Dalton, Master in Chambers, 9 P. R. 80, that the case came within Rule 94, and that the plaintiff had a right to make both companies parties. *Harvey v. Grand Trunk R. W. Co. and Great Western R. W. Co. et al.*, 7 A. R. 715.

2. Special Conditions.

(a) Liability as Carriers or Warehousemen.

On the back of the request note and shipping receipt given and received by the plaintiff on the shipment of goods from Montreal to Toronto, and the freight advice note received by him on the arrival of the goods at Toronto, and specially referred to on the face thereof respectively, were a number of conditions under the heading: "General notices and conditions of carriage," one of which was that the company should not be liable for any goods left until called for or to order, or warehoused for the convenience of the parties to whom they belonged, &c., and that the warehousing of all goods would be at the owner's risk and expense. On the arrival of the goods at Toronto they were placed in the defendants' warehouse there, and the plaintiff, on receipt of the freight advice note called at the warehouse, and obtained permission to leave them there, nothing being said about storage. The goods were subsequently lost, and the plaintiff

brought an action against the defendants to recover their value:—Held, that he could not recover, for although the defendants must be deemed to have held the goods as warehousemen and not as carriers, the terms and conditions of the request note and shipping receipt, which constituted the contract between the parties, applied and bound the plaintiff, irrespective of whether he had read the conditions or knew their contents, and therefore the defendants were protected by the condition above set forth. *Mayer v. Grand Trunk R. W. Co.*, 31 C. P. 248.

The plaintiff, who lived at Meaford, sold a quantity of barley by sample to one D., a brewer in Toronto, and shipped same by the defendants' railway, consigned to D. at Brock street, signing a consignment note and receiving a shipping receipt from the company, which stipulated such receipt should not be transferable, but that as to grain consigned to defendants' elevator at Toronto defendants would grant a negotiable receipt, and was subject to certain conditions, set out in the report of the case. The barley was duly carried to Toronto and warehoused by defendants in their elevator there, under, as they contended, the right conferred therefor by the conditions; and they then tendered grain of the same grade as plaintiff's, which D. refused to accept:—Held, that the consignment note and shipping receipt, which constituted the contract between the parties, showed that a distinction was made between grain consigned to the defendants' elevator and other grain; the conditions as to warehousing, set out in the report of the case, being only applicable to the former, and that the plaintiff was therefore entitled to recover the damages sustained by the non-delivery of the specific grain shipped. *Leader v. The Northern R. W. Co. et al.*, 3 O. R., C. P. D. 92.

See *Erb v. The Great Western R. W. Co. of Canada*, 5 S. C. R. 179, p. 686.

(b) Other Cases.

To an action for the non-delivery of goods delivered to defendants to be carried from Hamilton to Toronto, the defendants set up that they duly carried and delivered the said goods to the plaintiff at Toronto, but that he did not, as required by one of the terms of the special contract entered into between the parties, give the defendants within thirty-six hours thereafter notice of any damage or loss, &c.:—Held, that the defence failed, as the evidence shewed that the goods were never carried or delivered as alleged. A further defence set up was, that the plaintiff could not maintain the action, which was in case, because he was not the owner of the goods at the time of the shipment at Hamilton, having sold them to one H.:—Held, also that the evidence shewed that he was the owner, for although there appeared to have been a sale, the property was not to pass until the delivery of the goods at Toronto. *Steele v. The Grand Trunk R. W. Co.*, 31 C. P. 260.

The respondents sued the appellants' railway company, for breach of contract to carry petroleum in covered cars from L. to H., alleging that they negligently carried the same upon open platform cars, whereby the barrels in which the oil was were exposed to the sun and weather

and were destroyed. At the trial, a verbal contract between plaintiffs and defendants' agent at L. was proved, that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars, and delayed in different places, and in consequence a large quantity was lost. On the shipment of the oil, a receipt note was given which said nothing about covered cars, and which stated that the goods were subject to conditions endorsed thereon, one of which was, "that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk."—Held, per Ritchie, C. J., and Fournier and Henry, JJ., that the loss did not result from any risks by the contract imposed on the owners, but that it arose from the wrongful act of the defendants in placing the oil on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as their duty as carriers. Per Strong, Fournier, Henry, and Gwynne, JJ. The evidence was admissible to prove a verbal contract to carry in covered cars, which contract the agent at L. was authorized to enter into, and which must be incorporated with the writing so as to make the whole contract one for carriage in covered cars, and that non-compliance with the provision as to carriage in covered cars, prevented the appellants setting up the condition that "oil was carried at the owner's risk" as exempting them from liability. *The Grand Trunk R. W. Co. of Canada v. Fitzgerald*, 5 S. C. R. 204.

The Railway Act, 1879, 42 Vict. c. 9, s. 25, sub-s. 4, which declares that the party aggrieved by any neglect or refusal in the premises, shall have an action therefor against the company, from which action the company shall not be relieved by any notice, conditions, or declarations, if the damage has arisen from any negligence or omission of the company, or of its servants, is applicable to the defendant company, and the words "in the premises" means the premises as set out in the previous sub-sections. The plaintiff shipped live stock on the defendants' railway, subject to the conditions on a shipping bill, one of which was that live stock was taken entirely at the owner's risk of loss, injury, or damage, whether in loading or unloading conveyances or otherwise, and that all live stock should be carried by special contract only. The animals were killed or lost by the defendants' negligence:—Held, that the defendants could not escape liability by their conditions, for their liability was expressly provided for by the above clause of the Railway Act. *Vogel v. Grand Trunk R. W. Co.*, 2 O. R., Q. B. D. 197.

VII. LIABILITY FOR ACTS OF AGENTS.

C., a freight agent of respondents at Chatham, and a partner in the firm of B. & Co., caused printed receipts or shipping notes, in the form commonly used by the railway company, to be signed by his name as the company's agent in favour of B. & Co. for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from B. & Co. the flour addressed to the appellants, and were attached to drafts drawn by B. & Co. and accepted by appellants. C. received the proceeds of the drafts and absconded.

In an action to recover the amount of the drafts:—Held (Fournier and Henry, JJ., dissenting), that the act of C. in issuing a false and fraudulent receipt for goods never delivered to the company was not an act done within the scope of his authority as the company's agent, and the latter was therefore not liable. *Erb et al. v. The Great Western R. W. Co. of Canada*, 5 S. C. R. 179; 3 A. R. 446; 42 Q. B. 46.

VIII. STOCK.

1. Conditional Subscription.

See *Nasmith v. Manning*, 5 A. R. 126, p. 134.

2. Directors.

Personal liability of president of a railway company on an acceptance of a bill of exchange. See *Madden v. Cox*, 5 A. R. 473, p. 143.

Where the directors of a railway company passed a by-law, enacting that the salary of the plaintiff, as solicitor of the company, should be fixed at \$1,000 per annum, which by-law was afterwards, at a meeting of shareholders, repealed:—Held, that the by-law was within the competence of the directors, under C. S. C. c. 66, s. 47, and the shareholders could not undo the arrangement in respect of past services of the solicitor received by them. *Falkiner v. The Grand Junction R. W. Co.*, 4 O. R., Chy. D. 350.

Without express power it is the right of the directors of a railway company to appoint necessary officers and agents of the company, and to provide for the manner of their payment. *Id.*

See *McLaren v. Fiske*, 28 Chy. 352, p. 141.

IX. BONDS.

1. Right of Bondholders to Register and Vote.

A trustee held certain debentures of a railway company on trust to secure certain creditors of the company for advances made by them, which debentures were to be handed over to the creditors for sale, upon the company making default in payment of the advances. The company made default, and the debentures were delivered over to the creditors:—Held, that the creditors were entitled under 34 Vict. c. 43, s. 33, to be registered as holders of the debentures, to enable them to qualify and vote for directors; and that a mandamus should issue to compel the company so to register them. *In re Thomson et al. and The Victoria R. W. Co.*, 8 P. R. 423.—Wilson.

O., being the holder of fourteen bonds of the railway company, issued on 1st May, 1876, payable on 1st January, 1881, with interest meanwhile half yearly at 6 per cent. per annum, requested the secretary of the company to register the bonds under 33 Vict., c. 56, O. This the secretary refused to do unless the intermediate transfers were produced and registered at the same time:—Held, that the secretary was bound to register the bonds without the production or registration of the transfers, and a summons for a mandamus was made absolute with costs. *In re Osler v. The Toronto, Grey and Bruce R. W. Co.*, 8 P. R. 506.—Wilson.

The Canadian Bank of Commerce received from M. R. & Co., bankers in London, bonds of the T. G. & B. Ry., to the amount of £105,800, represented by M. R. & Co. as belonging to different persons named, and tendered them for registration at the railway office, in order that these persons might vote thereon. The secretary of the railway company registered such of the bonds as stood in the names of the original holders, but refused to register the others unless written transfers from the original holders were produced:—Held, that the company should register the bonds without the production of the transfers; that the proof of title in the alleged owners was sufficient; that the issue of scrip in London as representing the bonds formed no objection; and a mandamus to register the bonds was granted. *In re Johnson and The Toronto, Grey and Bruce R. W. Co. et al.*, 8 P. R. 535.—Wilson

By the Act of incorporation of a railway company, every shareholder was entitled to one vote for every share held by him. It was provided by the same Act, that if the interest on the bonds issued by the company should be in arrear, all holders of bonds should have the same right of voting and qualification for directors as were attached to shareholders:—Held, that the bondholders were not entitled to more than one vote on each bond. *Bunting et al. v. Laidlaw et al.*, 8 P. R. 538.—Galt.

Under a statute which provided that, in the event at any time of the interest upon the bonds of a railway company remaining unpaid and owing, then, at the next general meeting of the company, all holders of bonds should have and possess the same rights and privileges, and qualifications for directors, and for voting, as are attached to shareholders, provided that the bonds, and any transfers thereof, should have been first registered in the same manner as was provided for the registration of shares:—Held, that the words "at the next general meeting" were merely indicative of the earliest period at which the bondholders might vote, and that the statute did not require a new registration in order to entitle the bondholder to vote at any subsequent meeting, so long as the interest remained unpaid. Held, also, that the bondholders' right to vote was not limited to the right of voting for directors, but that they had the right to vote on all subjects properly coming before a general annual meeting upon which shareholders might vote. And where a subsequent statute extended the bondholders' right of voting to "special meetings." Held, also, that the bondholders had the like right to vote on all subjects coming before "special meetings." *Hendrie v. The Grand Trunk R. W. of Canada; The Grand Trunk R. W. of Canada v. The Toronto, Grey, and Bruce R. W.*, 2 O. R., Chy. D. 441. This case has been carried to appeal.

When a further statute authorized the railway company to enter into agreements with any other company, for leasing or working its line, provided that assent thereto should be given by at least two-thirds of the shareholders present, or represented by proxy, at any meeting specially called for the purpose. Held, that the word "shareholders" must be interpreted to include all who were entitled to vote as shareholders, which included bondholders. Held, also, that the re-

gistered bondholders were entitled to vote at a special meeting called for the purpose of obtaining the assent of the shareholders to such an arrangement, on the question of its adoption. *Osler v. Toronto Grey, and Bruce R. W. Co.*, 8 P. R. 506: and *Re Johnson and Toronto, Grey, and Bruce R. W. Co.*, 8 P. R. 535, followed. Held, also, that the votes of registered bondholders having been rejected, the arrangement, though confirmed by two-thirds of the actual shareholders present, or represented, was nevertheless not properly confirmed within the meaning of the statute, and an action to compel specific performance of the agreement was dismissed. *Ib.*

To an application for a mandamus to compel a railway company to register bonds, it was objected that it did not appear the company had made default in payment of the interest, the coupons not being shewn to have been presented at the place named for payment:—Held, that the fact of the company never having been ready to pay them there or elsewhere, was a sufficient answer to their objection. *Re Thomson and The Victoria R. W. Co.*, 9 P. R. 119.—Osler.

A demand upon a railway company to register the bonds was held sufficiently made upon the assistant secretary, who, it was shewn, performed all the duties of the secretary's office. *Ib.*

If the holders of railway bonds desire to acquire the right of voting thereon under the Act, all the transfers must be evidenced in such a way as to enable the company to register them in the same manner as they register shares. No special provision by by-law for the registration of such bonds is requisite. *Ib.*

It is enough that the bondholders on the application for a mandamus should make out a prima facie title, and the mere fact that they were directors of the company was held no objection, it not being denied that they had done what was necessary under 37 Vict. c. 63, s. 25, to entitle them to become holders. *Ib.*

X. AID TO RAILWAY COMPANIES BY MUNICIPALITIES.

Held, that where a by-law granting a bonus to a railway company has been carried by the electors, a municipal council may refuse finally to pass the same because the passage of the by-law has been procured by bribery, and may set up such bribery in answer to an application for a mandamus:—Quære, whether it must be shewn, as it was here, that enough votes have been bribed to destroy the majority. Semble, that a mandamus should not be granted at the instance of any railway company or person to be benefited by such by-law, where a single act of bribery or corruption has been brought home to the applicant. *In re Langdon and the Arthur Junction R. W. Co., and the Corporation of the Township of Arthur*, 45 Q. B. 47.

Held, following the decision of the Supreme Court of Canada, *In re Grand Junction R. W. v. Peterborough* (8 S. C. R. 77), that a writ of mandamus to compel the issue of debentures by a municipal corporation under a by-law in aid of a railway, will not be granted upon motion, but the applicant must bring his action. *In re The*

Canada Atlantic R. W. Co. and the Corporation of the Township of Cambridge, 3 O. R., Q. B. D. 291.

By 18 Vict. c. 33 the Grand Junction Railway Company, which was to run from the Town of Peterborough to Toronto, was, with certain other companies, incorporated with the Grand Trunk Railway Company. Not having been built within the stipulated time, the charter of the former company expired, and in May, 1870, the Grand Trunk Railway having refused to construct it, an Act was passed by the dominion parliament, 33 Vict. c. 53, dissociating the work from the Grand Trunk Railway Company, and reviving the charter of the Grand Junction Railway Company. It directed that all the corporate powers originally vested in that company should be vested in certain persons, who should exercise the same as fully as the parties named in the original charter could have done, and extended the time for construction. On the 23rd of November, of the same year, the ratepayers of the defendant municipality voted in favour of granting the company a bonus of \$75,000, but the by-law was never read a third time. At the time the municipality had no power to grant a bonus to a railway company, but subsequently, in 1871, by 34 Vict. c. 48, O., the by-law was declared as valid as if it had been read a third time. It was declared to be binding on the corporation, and they were directed to act upon it, and issue debentures, as if it had been proposed after the Act. On the same day the municipal law was amended so as to empower all municipalities to grant aid for similar purposes. 37 Vict. c. 43, O., was then passed, amending and consolidating the Acts relating to the plaintiffs' railway, but it did not expressly give retrospective validity to anything that had been done, or mention the by-law, and by 39 Vict. c. 71, O., the time for completion was further extended, and it was directed that none of the by-laws should lapse by reason of non-completion within the time previously fixed:—Held, reversing the judgment of the Q. B. (45 Q. B. 302), that the Grand Junction Railway Company, being a local work of the province of Ontario, the Act 33 Vict. c. 53, was ultra vires of the dominion parliament, and that the company were therefore not in existence when the defendants granted the bonus, or when the Act 34 Vict. c. 48, validating the by-law was passed; and as 37 Vict. c. 43, O., which was the first Act by a legislature having power to incorporate them, did not legalize the by-law in favour of the plaintiffs, they were not entitled to a mandamus to compel the delivery of the debentures. *Re Grand Junction R. W. v. The County of Peterborough*, 6 A. R. 339. Affirmed by the Supreme Court, 8 S. C. R. 77.

Per Patterson, J. A., the omission of the plaintiffs to file any plan in accordance with sec. 10, sub-s. 4, of the Railway Clauses Act, 14-15 Vict. c. 51, was a sufficient answer to the application. *Ib.*

It was provided by the by-law that in the event of trustees being thereafter appointed by the legislature for receiving the debentures, the warden should, within six months after the passing of the Act, deliver the debentures to them. No special Act was passed nominating the trustees, but by the Act of 1871, 34 Vict. c. 48, O., it was enacted that whenever any muni-

cipality should grant a bonus to the company, the debentures might, at the option of the municipality, be delivered to three trustees to be named as therein directed. Per Patterson, J. A., the legislature had not appointed trustees within the meaning of the by-law, and as there was therefore no default in delivering the debentures, the mandamus must on this ground also be refused. *Ib.*

XI. AMALGAMATION OF RAILWAYS.

Part of the consideration for the right of way over plaintiff's land was that the company, the Belleville and North Hastings Railway Company, should construct a cattle pass under the railway, for the use of the plaintiff. The company refused to construct the pass, whereupon the plaintiff, on the 30th April, 1880, filed a bill in Chancery against them to enforce the agreement, to which the company on the 13th September, 1880, filed an answer, and on the 13th November a decree was obtained by consent to construct it on certain terms specified therein. In March, 1879, the Acts, 42 Vict. caps. 53 and 57, O., were passed, authorizing the Belleville and North Hastings Railway Company, and the defendants to enter into an agreement for amalgamation subject to the ratification and approval of a majority of the shareholders of said companies, at public meetings called for such purpose. On the 29th June, 1880, an agreement was entered into for the amalgamation of the two companies under defendants' name, which was on the same day ratified and approved of by the respective shareholders. The plaintiff had no notice or knowledge of the deed of amalgamation, or of its contents. On the 4th March, 1881, the Act 44 Vict. c. 64, O., was passed, by sec. 1, of which the said deed of amalgamation was declared legal and valid, and that the two companies should be amalgamated and united, under the defendants' name, in the terms of the said deed. The decree not having been carried out, the plaintiff brought this action against the defendants to enforce it:—Held, that there was no complete amalgamation of the two companies until the passing of 44 Vict. c. 64, O., so that the Belleville and North Hastings Railway Company had not ceased to exist when the decree was made, which was therefore legal and valid; and that the plaintiff was entitled to maintain this action to enforce it against the defendants. *Fargey v. The Grand Junction R. W. Co.*, 4 O. R., C. P. D. 232.

XII. RAILWAY IN HANDS OF RECEIVER.

The receiver appointed to receive the proceeds of a railway company and apply the same in carrying on the business of the company, paid \$55.97 to the owner of land over which the line ran for the right of way over his lands, he having threatened to obstruct the passage of the company's trains unless paid. On passing his accounts the master refused to allow the payment in favour of the receiver, which ruling of the master was affirmed on appeal, as such payment did not properly come under the head of "working expenses and outgoings" for the road, and which alone the receiver was authorized to pay; but the court (Spragge, C.) gave the receiver liberty to take out an order now for the allowance of this disbursement, on payment of

the costs of the appeal—but refused to make such an order in respect of fees paid to the solicitor of the company for the examination of titles, as there was not any evidence to shew that the payment was such as would have been sanctioned by the court if applied to in the first instance for permission to pay the same. *Gooderham v. Toronto and Nipissing R. W. Co.*—*Fox v. Toronto and Nipissing R. W. Co.*, 28 Chy. 212. Affirmed in appeal.

A receiver of the defendants' railway had been appointed to take the revenues, issues, and profits, to pass his accounts periodically, and to pay into court the balance due from him after providing for the working expenses and outgoings of the railway. The master was directed to take an account of all persons entitled to liens, charges, or incumbrances, and to settle their priorities, and the money to be paid into court was to be paid to such persons according to their priorities to be ascertained:—Held, affirming the decision of Proudfoot, V. C., that the Master, in taking the receiver's accounts, should have allowed debts paid for working expenses which were not regularly payable until after his appointment, but not those already in default at that time, which were properly payable out of the moneys to be paid into court according to their priority. *Gooderham v. Toronto and Nipissing R. W. Co.*, 8 A. R. 685.

Although the duty of the receiver of the gross proceeds and revenues of a railway, is to pay thereout all expenses necessary for the maintenance, management and working of the undertaking, he would not be warranted in expending the same in any extraordinary outlay; and where an application was made by the receiver to authorize the purchase of a large amount of rolling stock, the outlay in respect of which would require to be met by anticipating income, the court (Boyd, C.) refused to sanction the expenditure. *Lee v. Victoria R. W. Co.*, 29 Chy. 110.

See *Fox v. Nipissing R. W. Co.*; *Gooderham v. Nipissing R. W. Co.*, 29 Chy. 11, p. 694; *Lee v. Credit Valley R. W. Co.*, 29 Chy. 480, p. 341.

XIII. MISCELLANEOUS CASES.

Where land had been taken by the Great Western R. W. Co., for the purposes of their railway under 9 Vict. c. 81, s. 30, and 16 Vict. c. 99, the company, in ejectment brought by them, can rely on the title acquired thereby, and are not driven to prove strictly the title of their grantors. *The Great Western R. W. Co. v. Lutz*, 32 Q. B. 166, p. 229.

Held, that the defendants, a railway company, were not subject to the provisions of "The Ditches and Water Courses Act," R. S. O. c. 199. *Miller v. Grand Trunk R. W. Co.*, 45 Q. B. 222.

Under the Assessment Act of 1869, 32 Vict. c. 36, the lands of railways might be sold for the non-payment of taxes. *Smith v. The Midland R. W. Co.*, 4 O. R., Chy. D. 494.

XIV. SPECIAL ACTS RELATING TO PARTICULAR COMPANIES.

1. *Canada Atlantic Railway Company.*

The charter of the Canada Atlantic Railway Company, reciting in the preamble that the line

of railway which it was proposed to construct, would afford the shortest and most convenient connection between the cities of Ottawa and Montreal, authorized the company to construct their track from the city of Ottawa to, &c. The head office was to be in Ottawa:—Held, that they had the right to enter the city and construct from a point within its limits. *In re Bronson et al.*, and *The Corporation of the City of Ottawa*, 1 O. R., Q. B. D. 415.

2. *Canada Central Railway Company.*

Held, Armour, J., dissenting, that the timber licenses claimed by the plaintiff as licensee of the Ontario Government were subject to the right of the Canada Central Railway Company acquired before confederation to construct their road across the Crown lands over which the licenses in question extended, and that the defendants, assignees of the railway company, were, therefore, not liable in trespass for entering upon, and cutting the timber on the said limits in prosecution of the work of building said railway. *Foran v. McIntyre et al.*, 45 Q. B. 288.

The plaintiff herein, a timber licensee, sold his interest in the license and limits to one W., who entered and cut timber, but the transfer was not proved, and by the regulations of the Crown lands department all transfers were to be in writing and subject to their approval, and were to be valid only from such approval:—Held, that the legal title to the limits and timber thereon was in the plaintiff, and that W.'s possession was the plaintiff's, who was entitled to maintain an action for damage done to the limits:—Held, that the Canada Central Railway acquired under their charter, granted by the Act 19 & 20 Vict. c. 112, and subsequent Acts relating thereto passed prior to confederation, the right, which was preserved by sec. 109 of the B. N. A. Act, to enter on the Crown lands in the province of Ontario on the line of the railway included in a subsequent timber license granted to the plaintiff, and to cut the timber within six rods of either side thereof, without any restriction as to obtaining the consent of the Lieutenant-Governor in Council:—Semble, that in the case of railway companies within the exclusive jurisdiction of the dominion parliament, it has the power to confer upon such companies the right of constructing their lines through the Crown lands of the several provinces through which they may pass, without such consent of the lieutenant-governor in council. *Booth v. McIntyre et al.*, 31 C. P. 183.

By s. 4 of 19 & 20 Vict. c. 112, the clauses amongst others, of the Railway Clauses Consolidation Act, 14 & 15 Vict. c. 51, relating to lands were incorporated therewith, whereby the company were empowered to enter upon the crown lands on the line of their railway, and to fell and remove the trees standing thereon, &c. By s. 8 of the 16 Vict. c. 169, possession of such lands was not to be taken without the consent of the governor in council, but it was expressly provided that this was not to limit or affect the powers given by the special Act:—Held, that the last named proviso shewed that the said sec. 8 was not to apply to this company *Ib.*

See *Jones v. The Canada Central R. W. Co.*, 46 Q. B. 250, p. 116.

RECEIVER.

I. APPOINTMENT OF.

1. *Application for*, 693.

II. POWERS OF.

1. *Taking proceedings in Matters which Occurred Previous to his Appointment*, 694.2. *Insurance Companies*, 694.3. *Railway Companies*—See RAILWAYS AND RAILWAY COMPANIES.

III. LIABILITY OF, 694.

IV. ATTACHMENT OF MONEYS IN HANDS OF, 695.

V. RIGHT OF, TO COSTS, 695.

I. APPOINTMENT OF.

1. *Application for*.

A notice of motion for partition having been served, the plaintiff moved for an injunction restraining the defendant from collecting rents, and for a receiver. It appeared that the defendant was a stranger, whose right to be in possession was denied:—Held, that no relief could be had against him without bill filed. *Young v. Wright*, 8 P. R. 198.—Blake.

When the misconduct is such as would entitle a plaintiff at the outset to apply for an injunction or a receiver, an action should be brought. *Sullivan v. Harty*, 9 P. R. 500—Boyd.

The plaintiff, carrying on the business of a druggist, mortgaged his stock in trade to the defendant; the instrument by which it was effected, stipulating that the defendant should take possession of the premises, to hold for four months in order to secure re-payment of money advanced, and power was given to the mortgagee to add new stock so as to keep up the business. Default was made in payment, and thereafter a large amount of stock was added, some of the money being expended by the defendant with the assent of the plaintiff; other money, being part of the profits of the business, was thus reinvested in new stock; some of the old stock remaining in specie. The matter was referred to the master at Belleville, to take the accounts of the dealings between the parties. Before the master made his report, the plaintiff applied on petition for the appointment of a receiver, on the ground that the mortgage had been paid in full:—Held, (1) that as the new stock belonged to the mortgagee himself, and the plaintiff could therefore have no claim upon it, and as the master had not yet found which party was indebted to the other, his finding would not be anticipated by the appointment of a receiver; (2) that although the defendant's right on default, was to sell the original stock en bloc after notice, still the defendant was at liberty to add further capital and stock to the business, but not to the prejudice of the mortgagor so as to improve him out of his estate; and so long as the plaintiff chose to allow the business to go on under the defendant's control, he had the right so to conduct it, subject to being called on to account. *Foster v. Morden*, 29 Chy. 25.

II. POWERS OF.

1. *Taking Proceedings in Matters which Occurred Previous to his Appointment*.

After a decree had been pronounced directing the appointment of a receiver, but before the appointment was completed, the defendant company had made a payment to a creditor, which the plaintiff F., a judgment creditor, alleged to be a fraudulent preference, and moved for an order that the receiver should take proceedings to recover the money so paid:—Held, that as the payment complained of took place before the actual appointment of the receiver, it was more reasonable that those who were interested at the time the payment was made, parties to the suit, and who objected to what had been done, should in person apply for the appropriate relief. *Fox v. Nipissing R. W. Co.*—*Gooderham v. Nipissing R. W. Co.*, 29 Chy. 11.

2. *Insurance Companies*.

In these cases an objection was taken that there was no power to sue because the company's license under 42 Vict. c. 25, Ont., had been revoked, but it was shewn that one B. had been appointed receiver, and was specially required by order of the Chancery division, to prosecute all members in arrear for calls, and that he had adopted these actions, and was prosecuting them as receiver:—Held, that the objection was not tenable. *The Union Fire Ins. Co. v. Fitzsimmons et al.*—*The Union Fire Ins. Co. v. Shields*, 32 C. P. 602.

Where an application was made to the court to add the persons who had signed premium notes as parties in the master's office, and to direct the master to assess the amounts due upon the notes, and to order payment of the same to the receiver from time to time, it was shewn that the directors had not made any assessments upon the notes pursuant to R.S.O. c. 161, s. 45, et seq.:—Held, that as the liability attached only upon such assessment by the directors, the court should not add to, or alter the liability of the parties who had made the notes by referring it to the master or a receiver to do that which the directors only could do; clause 75 of 36 Vict. c. 44, which gave power to a receiver to do this, having been omitted from the statute on revision. *Hill v. Merchants and Manufacturers' Ins. Co.*, 28 Chy. 560.

III. LIABILITY OF.

On the 29th January, 1878, an order was made directing that D. be receiver in the suit, he first giving security to the satisfaction of the registrar. At the date of the order and previously thereto, D. was the agent of the mortgagor, and as such collected the rents of the property in question. D. received verbal notice of the order and executed his own bond as security, which the registrar declined to accept, and D. continued to receive the rents and pay them to the mortgagor. On the 20th May, D. executed a second bond, reciting the order of the 29th January, and conditioned that he "do and shall account for every sum of money which he shall receive on account of rent," which was filed on the 22nd of May,

and on the 3rd of June, a copy of the order of the 29th January, was served on him, and he was notified that his security had been accepted :—Held, by the master in ordinary, and affirmed on appeal by Spragge, C., that D. was accountable for the rents received since the 29th January, but was entitled to be allowed for any disbursements properly made by him. *Western Canada, &c. v. Ince*, 8 P. R. 262.

IV. ATTACHMENT OF MONEYS IN HANDS OF.

See *Leaming v. Woon*, 7 A. R. 42, p. 34.

V. RIGHT OF, TO COSTS.

A receiver is entitled as against the defendants, to the costs of a suit in which he succeeds, though the action has been brought without the sanction of the court. *Re Neill—Dickey et al. v. Neill*, 9 P. R. 176.—Proudfoot.

RECITALS.

In recognizance.—See *Re Gauthreaux's Bail*, 9 P. R. 31, p. 696.

RECEIPT.

PREMIUM AND INTERIM RECEIPTS FOR INSURANCES.—See INSURANCE.

Held, that a mortgage which contains an acknowledgment of receipt of the mortgage money, but no covenant for repayment of money, does not of itself afford conclusive evidence of a debt, so that the mortgagee or his assigns can maintain an action for its recovery. *The London Loan Co. v. Smyth*, 32 C. P. 530.

The acknowledgment of the correctness of a bank account at the end of a month was held to be at most an acknowledgment of the balance on the assumption that the cheques had been paid to the proper parties. *Agricultural Savings and Loan Association v. Federal Bank*, 6 A. R. 192.

See *Livingston v. Wood*, 27 Chy. 515, p. 256.

RECEIVING STOLEN GOODS.

See *Regina v. St. Denis*, 8 P. R. 16, p. 188.

RECOGNIZANCE.

A recognizance taken before a police magistrate under 32-33 Vict. c. 30, s. 44, D., Form Q. 2 (Sched.), omitted the words "to owe":—Held, fatal, and that an action would not lie upon the instrument as a recognizance. *Regina v. Hoodless*, 45 Q. B. 556.

Held, that the forfeiture of a recognizance to appear was a debt sufficient to support the application for an attachment under the Absconding Debtors' Act, and that such writ may be

granted at the suit of the crown, where the defendant absconds to avoid being arrested for a felony. *Regina v. Stewart*, 8 P. R. 297.—Osler.

A recognizance of bail put in on behalf of a prisoner, recited that he had been indicted at the Court of General Sessions of the Peace for two separate offences, and the condition was, that he should appear at the next sittings of said court, and plead to such indictment as might be found against him by the grand jury. At the next of said sittings the accused did not appear, and no new indictment was found against him :—Held, that the recitals sufficiently shewed the intention to be that the accused should appear and answer the indictments already found, and that an order estreating the recognizance was properly made. *Re Gauthreaux's Bail*, 9 P. R. 31.—Osler.

RECTIFYING DEEDS.

See DEED.

REDEMPTION OF MORTGAGES.

See MORTGAGES.

REFEREE.

See PRACTICE.

REFERENCE.

I. TO ARBITRATION—See ARBITRATION AND AWARD.

II. TO MASTER—See PRACTICE.

REFORMING DEEDS.

See DEED.

Semble, it does not follow because a plaintiff asks in his bill for reformation of a document that therefore a defendant is entitled to claim the same relief though he has not asked for it. *Wolfe v. Hughes*, 1 O. R. 322.

REGISTRATION.

I. OF BILLS OF SALE AND CHATTEL MORTGAGES—See BILLS OF SALE AND CHATTEL MORTGAGES.

II. OF DEEDS—See REGISTRY LAWS.

III. OF MECHANICAL LIENS—See LIEN.

IV. OF MEDICAL PRACTITIONERS—See MEDICAL PRACTITIONERS.

V. OF PLANS—See REGISTRY LAWS.

VI. OF RAILWAY BONDS—See RAILWAYS AND RAILWAY COMPANIES.

VII. OF VOTERS—See PARLIAMENTARY ELECTIONS.

VIII. OF WILLS—See WILL.

REGISTRY LAWS.

I. REGISTRY ACTS, 697.

II. REGISTRARS.

1. *Liability for Wrongful Registration of Instruments*, 697.
2. *Fees of*, 698.

III. INSTRUMENTS WHICH MAY BE REGISTERED, 699.

IV. EFFECT OF REGISTERING OR OMITTING TO REGISTER.

1. *Plans*, 699.
2. *Wills*, 700.
3. *Notice*, 700.
4. *Priority*, 700.
5. *Equitable Interests*, 700.
6. *Discharge of Mortgages*—See MORTGAGE.

V. NOVA SCOTIA REGISTRY ACTS, 701.

I. REGISTRY ACTS.

The Registry Act of 1865, sec. 66, and the Registry Act of 1868, sec. 68, are retrospective. *Miller v. Brown*, 3 O. R., Chy. D. 210.

II. REGISTRARS.

1. *Liability for Wrongful Registration of Instruments*.

S., believing that his father (still living, but of unsound mind) was entitled to certain lands to which the plaintiffs claimed title, took the advice of his solicitor, C., who, being advised by counsel, instructed by S., prepared and registered an instrument, whereby he, S., stated that he claimed the lands, and would upon the demise of his father commence proceedings for their recovery. The plaintiffs were thus obstructed in the sale of their lands, and brought an action against S., C., and the registrar, to remove the instrument from the register, as being a cloud on the title, and for damages. Proudfoot, J., dismissed the action as against the registrar, but gave judgment, with a reference to assess damages, against S. and C., (4 O. R. 473) :—Held, that the Registry Act did not authorize the registration of such an instrument; and, (Cameron, J., dissenting,) that an action would lie for its removal. *Ontario Industrial Loan and Investment Company v. Lindsey et al.*, 3 O. R., Q. B. D. 66.

Per Cameron, J.—The instrument, being on its face one which did not affect the title, was not removable by the court, and the action should be dismissed. *Ib.*

Per Hagarty, C.J., and Armour, J.—The act of registration was a wrongful one, and all parties concerned in it were responsible to the plaintiffs,

and the registrar was therefore a proper party; but, per Hagarty, C.J., he was not a necessary party. *Ib.*

Per Hagarty, C. J., there being no mala fides, the damages should be nominal. *Ib.*

Per Cameron, J., the registrar was not a proper party, having acted in good faith, and in the belief that he was acting within the scope of his duty; nor was C., the solicitor, a proper party, he having acted to the best of his judgment and ability in advising his client, after consulting counsel. *Ib.*

2. *Fees of*.

The plaintiff sued the defendant for the proportion of fees received by the defendant as registrar, to which they were entitled under R. S. O. c. 111, ss. 98-103. The defendant demurred to the declaration on the ground that these sections were ultra vires of the local legislature, as they imposed an indirect tax, and not a tax for raising a revenue for provincial purposes:—Held, affirming the judgment of Armour, J., that having received the money in question under the above Act, the defendant could not deny that he received it for the purposes therein provided:—Held, also, that if a tax at all, it was clearly a direct tax, and intra vires. *The County of Hastings v. Ponton*, 5 A. R. 543.

The defendant was registrar of the county of Bruce, and during the year 1882 was discharged from office. The plaintiffs brought this action for the recovery of the proportion of the amount of fees received by him up to the time of his dismissal in excess of the amount allowed to be retained by him pursuant to R. S. O. c. 111, s. 104:—Held, affirming the judgment of Galt, J., that the dismissal of the defendant during the year did not deprive the plaintiffs of their right to recover the excess, which right did not depend upon the return to be made in each year. *The Corporation of the County of Bruce v. McLay*, 3 O. R., Q. B. D. 23. This case is in Appeal.

In an action brought against a county registrar to recover back alleged overcharges, it was shewn that the plaintiff had called upon the registrar to search the books and indices in his office, and inform him of the persons named as grantees in the last executed deed of a certain lot; and also what incumbrances there were registered against it. There were 28 entries on the abstract index, and the registrar charged for these services \$1.45, being at the rate of 25c. for the first four entries and 5c. for each of the other entries:—Quære, whether the registrar was bound to do, or could recover for doing what the plaintiff required of him; but—Held, that as he had done it, the charge which the plaintiff had paid, and which was reasonable on the principle of the tariff, could not be recovered back. *Macnamara v. McLay*, 8 A. R. 319.

The plaintiff told the registrar that one A. owned a lot in the township of B., but was ignorant as to the number of the lot, and asked the registrar to tell him what incumbrances there were against it, which the registrar did, and charged for those services 25c. for ascertaining the number of the lot, and 25c. for searching for the incumbrances:—Held, that both were proper charges. *Ib.*

The plaintiff asked to examine an original conveyance in the registry office, informing the officer of the names of the parties thereto and the lands affected thereby, but did not tell him the number of the conveyance. The registrar examined the index, for which he charged 25c., and 10c. for producing the document:—Held, also, to be proper charges. *Ib.*

The registrar was required to produce the abstract index of a lot, which contained 180 entries for which he required to be paid \$2 as for a general search, the plaintiff offering to pay 25c.:—Held, (Burton, J.A., and Morrison J.A., dissenting,) that the registrar had charged \$1.75 too much. *Ib.*

The registrar charged \$2.05 for an abstract of five folios—i.e., \$1.20 for searches, the remainder being for copying at the usual rate:—Held, the registrar was entitled to those fees, though he only copied it from the index. *Ib.*

A registrar when preparing an abstract is not bound to rely on the correctness of the abstract index, but may properly test its correctness by making all searches necessary for the preparation of the abstract; he may rely, however, on the index if he thinks proper, and charge the same fees as for searches. But if he gives a certified copy of the abstract index only he can charge no more than the rate per folio. *Ib.*

Per Burton and Morrison, J.J.A.—The registrar is the proper person to make searches, and he must produce the original instruments and the books containing copies thereof only, but not the abstract index. *Ib.*

Per Spragge, C. J. O., and Patterson, J.A.—Every person interested in a lot of land is entitled to see the abstract index thereof for the purpose of making a search, as the book containing such abstract is one of those which the registrar is bound to exhibit under the Registry Act. *Ib.*

Per Spragge, C.J.O.—A registrar, when required to furnish a copy of any document or entry can make no charge for a search for the original. *Ross v. McLay*, 25 C. P. 190, overruled in part. *Ib.*

III. INSTRUMENTS WHICH MAY BE REGISTERED.

Quære, whether a deed of land not specifying any particular lot by description is capable of registration. *Russell v. Russell*, 28 Chy. 419.

See *Ontario Industrial Loan and Investment Co. v. Lindsey et al.*, 3 O. R. 66, p. 697.

IV. EFFECT OF REGISTERING OR OMITTING TO REGISTER.

1. Plans.

Held, that the registration of a plan of a subdivision of a town lot and sales made in accordance with it does not constitute a dedication of the lands thereon to the public, and the municipal council had, therefore, exceeded their powers in passing the by-law in question in this case. *In re Morton and the Corporation of the City of St. Thomas*, 6 A. R. 323.

2. Wills.

The widow kept possession of the will for eleven months after the death of the testator, when she burned it for the purpose of enabling her to borrow money on the property devised, and she subsequently sold her interest under the will—an estate for life—and the only child professed to convey, as heir-at-law, to one R., who created a mortgage, under which the property was sold to D., a bona fide purchaser without notice, who afterwards agreed to sell to R. for the amount of his purchase money, interest and costs:—Held, that there was not any such inevitable difficulty as afforded a reason for the will not being registered within twelve months after the death of the testator, and that therefore D. was entitled to the protection of the registry laws (R. S. O. c. 111, s. 75), as against the infant devisees; but it appearing that R. had notice of the will when he purchased from the widow and heir-at-law, the court declared the infants entitled to redeem. *Re Davis*, 27 Chy. 199.

3. Notice.

Several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs with the usual mortgagor's covenants. He afterwards conveyed another parcel to S., who, when he took his conveyance, was not aware of the plaintiffs' mortgage, but it was registered against the parcels embraced in it, though not against the other parcels:—Held, that the registration of the prior mortgage against the parcel bought by S. was notice to him of the right of persons who purchased other parcels before he purchased to throw the mortgage upon his parcel, and that S. was affected with notice of the plaintiffs' mortgage, and the right it conferred. *Clark v. Bogart*, 27 Chy. 450.

See *Re Davis*, 27 Chy. 199, *supra*; *Ross v. Hunter*, 7 S. C. R. 289, p. 702; *Dilke v. Douglas et al.*, 5 A. R. 63, p. 459.

4. Priority.

An execution creditor does not occupy as favourable a position under the Registry Act as a purchaser for value without notice; and he may be defeated by a deed made before though registered after the lodging of the execution in the hands of the sheriff. *Russell v. Russell*, 28 Chy. 419.

Where two mortgages on different properties by the same mortgagor came into C.'s hand before the Registry Act of 1865, and the mortgagor, after the passing of the said Act, assigned the equity of redemption to M. by a registered instrument:—Held, on M.'s suing for redemption, that the registered conveyance to M. prevailed, under section 66 of the said Act, over C.'s equitable right to consolidate the two mortgages. *Miller v. Brown*, 3 O. R., Chy. D. 210.

See *Trust and Loan Co. v. Gallagher*, 8 P. R. 97, p. 463; *Ross v. Hunter*, 7 S. C. R. 289, p. 702.

5. Equitable Interests.

In 1851 the defendant's father bought for defendant the land in question, and in pursuance of his

instructions, to prevent the defendant disposing of the land, the deed, which was registered, was made to defendant's son W., then about 12 years old. The defendant and his family thereupon took possession, and lived there up to the present time, the defendant being assessed and paying the taxes. The family residence, with the garden and orchard, which was fenced off from the rest of the land and comprised from two to four acres, was always deemed to be the defendant's special property, and he had always exclusive possession thereof, with the consent of the others. W. resided with his father for several years, and then went to the United States, but returned in 1869, when he conveyed by deed in fee simple, which was registered, to one H., his step-brother, who had full knowledge of all the facts and circumstances, and who had been working the land on shares with the defendant and another. Defendant complained to him of the sale, and denied W.'s right to sell, whereupon it was arranged that things were to go on as before, and defendant was to have his share. H., in 1870, and again in 1874, without the defendant's knowledge, mortgaged the land, by mortgages duly registered, to the plaintiffs, who had no notice or knowledge of any of the circumstances, or of the defendant's possession. In February, 1881, ejectment was brought by the plaintiffs:—Held, that the plaintiffs, being purchasers for value without notice, claiming under the registered paper title, were under R. S. O. c. 111, s. 81, entitled to recover, except as to the house and plot, to which the defendant by his exclusive possession had acquired a title under the Statute of Limitations. *The Canada Permanent Loan and Savings Co. v. McKay*, 32 C. P. 51.

V. NOVA SCOTIA REGISTRY ACTS.

R. (the appellant) brought an action against H. (the respondent) for having erected a brick wall over and upon the upper part of the south wall or cornice of appellant's store, pierced holes, &c. H. pleaded inter alia, special leave and license, and that he had done so for a valuable consideration paid by him, and an equitable re-joinder alleging that plaintiff and those through whom he claimed had notice of the defendant's title to this easement at the time they obtained their conveyances. In 1859 one C., who then owned R.'s property, granted by deed to H. the privilege of piercing the south wall, carrying his stovepipe into the flues, and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building, which was higher than R.'s. R. purchased in 1872 the property from the Bank of Nova Scotia, who got it from one F., to whom C. had conveyed it—all these conveyances being for valuable consideration. The deed from C. to H. was not recorded until 1871, and R.'s solicitor in searching the title, did not search under C.'s name after the registry of the deed by which the title passed out of C. in 1862, and did not therefore observe the deed creating the easement in favour of plaintiff. There was evidence, when attention was called to it, that respondent had no separate wall, and the northern wall above appellant's building could be seen:—Held, that the continuance of illegal burdens on R.'s property since the fee had been acquired by him were, in law, fresh and distinct trespasses against him,

for which he was entitled to recover damages, unless he was bound by the license or grant of C. That the deed creating the easement was an instrument requiring registration under the provisions of the Nova Scotia Registry Act, 4th series, Rev. Stat. N. S., c. 79, ss. 9 and 19, and was defeated by the prior registration of the subsequent purchaser's conveyance for valuable consideration, and therefore from the date of the registration of the conveyance from N. to F., that the deed of grant to H. became void at law against F, and all those claiming title through him. That to defeat a registered deed there must be actual notice or fraud, and there was no actual notice given to R. in this case, such as to disentitle him to insist in equity on his legal priority acquired under the statute. *Ross v. Hunter*, 7 S. C. R. 289.

Per Gwynne, J., dissenting: That upon the pleadings as they stood on the record, the question of the Registry Act did not arise, and that as the incumbrance complained of had been legally created in 1859, its mere continuance did not constitute a trespass, and that the action as framed should not be sustained. *Id.*

RELATOR.

See MUNICIPAL CORPORATIONS.

REHEARING.

See PRACTICE.

RELEASE.

I. OF ACTION, 702.

II. OF SURETY—See BAIL—PRINCIPAL AND SURETY.

I. OF ACTION.

After issue joined one of two plaintiffs gave to the defendant a release under seal of all actions and demands. The defendant thereupon moved to stay all proceedings in the suit:—Held, that the defendant should plead the release, and that he was not entitled to a stay of proceedings, and the remaining plaintiff was allowed to strike out the name of the other plaintiff. *McAlpine et al. v. Carling*, 8 P. R. 171.—Osler.

Action for work and materials. The cause having been entered for trial, defendant paid plaintiff \$2,500, and received a release expressed in the most general terms, and the record was withdrawn. The plaintiff again gave notice of trial, alleging that the \$2,500, was only part of the consideration for the settlement, and that the defendant was also to procure for him an appointment in the civil service with a salary of at least \$2,000 a year. He refused, however, to repay the \$2,500, though defendant offered, if he would do so, to give up the release. The master in chambers having set aside the notice of trial and stayed all proceedings, Armour, J., on appeal, rescinded this order on the 11th April, 1882, and permitted defendant to plead

the release on that day ; replication and joinder of issue to be filed on the two following days, and directed the issues to be tried at the next Assizes, which began on the 17th. The defendant took out the order and pleaded the release, and the plaintiff entered the case at these Assizes, but was allowed to withdraw it, and defendant in Easter Term following, appealed from the order of the learned judge :—Held (1), that the appeal having been made at the first sitting of the court, was not too late under Rule 414, though more than eight days had elapsed, and the time had not been extended ; (2) that defendant, under the circumstances, was not precluded by having acted under the order ; (3) that the order must be rescinded, for the plaintiff could not repudiate the release while retaining the money which he had received under it, and as the additional consideration alleged, was illegal, the plaintiff being particeps criminis, could not set it up to avoid the release. *Hewson v. Macdonald*, 32 C. P. 407.

The sheriff of Oxford, in executing a writ of replevin, was obstructed by the defendants, who rescued the goods. On complaint of the sheriff's officer, they were summarily tried before a police magistrate and fined, under 32-33 Vict. c. 32, by which it is declared that any person discharged or convicted in such a case shall be released from all further or other criminal proceedings for the same cause. A motion afterwards made by the plaintiff to attach the same parties for contempt, was discharged, but without costs. *Haywood et al. v. Hay et al.*, 46 Q. B. 562.

The purser of a steamboat had been summoned by the plaintiff before a magistrate for an assault, and a fine was imposed which he paid. Per Wilson, C. J.—This under 32-33 Vict. c. 20, s. 45. D., though a release to the purser, did not constitute any bar to the present civil action against the company. *Emerson v. The Niagara Navigation Co.*, 2 O. R., C. P. D. 528.

RELIGIOUS INSTITUTIONS.

I. CHURCHES.—See CHURCH.

II. BEQUESTS.—See WILL.

REMUNERATION.

I. TO EXECUTORS AND ADMINISTRATORS.—See EXECUTORS AND ADMINISTRATORS.

II. TO TRUSTEES.—See TRUSTS AND TRUSTEES.

RENDER.

See BAIL.

RENT.

See DISTRESS.—LANDLORD AND TENANT.

Devise of rent to attesting witness. See *Hopkins v. Hopkins et al.*, 3 O. R. 223.

Rent issuing out of land is a tenement, it partakes of the nature of land, and is within the 5th sec. of the Statute of frauds, and hence is also within 25 Geo. II. c. 6, s. 1. *Ib.*

REPAIRS.

By tenant for life. See *Re Smith's Trusts*, 4 O. R. 518, p. 234.

REPLEVIN.

I. ON SALE OF GOODS, 704.

II. FOR TIMBER, 704.

III. PLEADING AND PRACTICE, 705.

IV. REPLEVIN BOND, 706.

I. ON SALE OF GOODS.

M. by false representations induced T. to sell him a horse, buggy and harness and to take for them two promissory notes. T. having discovered the fraud went back and demanded back his goods, at the same time throwing the notes on the table. On the assurance of M. however, that on the following Tuesday he would bring the property or satisfaction, T. again took the notes and went away. M. did not appear as he had promised, and T. sued out a writ of replevin against M. but before it had been executed M. sold the property to plaintiff, an innocent purchaser who having been deprived of it under the replevin, brought trover against the sheriff :—Held, that the plaintiff was entitled to recover, that the contract had not been disaffirmed when the writ of replevin issued, and that the mere issue of it was no notice to M. of disaffirmance and could not affect the plaintiff :—Held, also, following *Great Western Railway Co. v. McEwan*, 28 Q. B. 528 ; 30 Q. B. 559, that the defendant as sheriff having taken the property out of the plaintiff's possession could not justify under the writ of replevin. *Stoeser v. Springer*, 7 A. R. 497.

See *McGregor v. McNeil*, 32 C. P. 538, p. 758.

II. FOR TIMBER.

The defendant's timber limits adjoined those of B. & C., but from uncertainty in description in their respective licenses, the division line was not defined. The defendant replevied 216 pieces of timber cut within a line run under instructions of the crown timber agent, as the boundary of the defendant's limits, but on account of the infirmity in his license, he failed in the action as to 175 pieces, for a return of which B. & C. were entitled to judgment. The latter procured an assignment of the replevin bond to themselves, and assigned it to the plaintiffs who brought this action thereon. The court was of opinion that the timber in question was cut upon lands intended by the crown to be within the limits of the defendant's license though B. & C. had some grounds for asserting title thereto :—Held, that there having been a breach of the condition of the bond, B. & C. became entitled to recover such damages as they had sus-

tained by replevin proceedings; that the bond, after it was assigned by the sheriff to B. & C., was a debt and chose in action assignable pursuant to the statute; and that the plaintiff having the beneficial interest therein by assignment was entitled to recover; but it being a case for the equitable interference of the court, it was directed that upon payment by the defendant of the cost incurred by B. & C. in cutting and transporting the timber up to time it was replevied, less a set-off found for the defendant in this action (the amount to be ascertained by a reference if the defendant should so elect), further proceedings should be stayed. *Bates et al v. Mackey*, 1 O. R., Q. B. D. 34.

L. et al., claiming certain lands in the township of Horton under a paper title, built a barn and camp in 1875, commenced and continued logging all that winter and in subsequent years. In 1877 McD., setting up a title under certain proceedings adopted at a meeting of the inhabitants of the township in 1847, held for the purpose of making provision for the poor, by which certain commissioners were authorized to sell vacant lands, entered upon and cut on the lands in question some 500 trees, which he put on the ice outside and inside L. et al.'s boom, mixing them with some 900 logs already in said boom, and cut by L. et al., in such a way that they could not be distinguished. McD. then claimed the whole as his own, and resisted L. et al.'s attempt to remove them. In an action of replevin brought by L. et al. for 1,440 logs cut on said lands:—Held, that L. et al.'s possession of the lands in question was sufficient to entitle them to recover in the present action against McD., who was a wrongdoer, all the logs cut on the lands in question. Per Strong, J. When one party wrongfully intermingles his logs with those of another, all the party whose logs are intermingled can require is that he should be permitted to take from the whole an equivalent in number and quality for those which he originally possessed. *McDonald et al. v. Lane*, 7 S. C. R. 462.

See *McGregor v. McNeil*, 32 C. P. 538, p. 758.

III. PLEADING AND PRACTICE.

In an action of replevin the sheriff replevied part of the goods, and certified in his return to the writ that the remainder had been eloiigned to places unknown before the writ came into his hands. The plaintiff declared in two counts. 1. For that the defendant unjustly detained the goods of the plaintiff, specifying the goods, replevied, until, &c. 2. For that the defendant unjustly detained and still detains, against sureties and pledges, the goods of the plaintiff, specifying the goods eloiigned:—Held, under R. S. O. c. 53, s. 24, that the second count was maintainable; that the two counts were properly joined, and that the declaration was not open to objection. *Thurston v. Breard*, 8 P. R. 10.—Hagarty.

The plaintiff issued a writ of replevin directing the sheriff to replevy "two hundred and thirty sheep and lambs," unjustly detained by the defendant. On the previous day defendant had sold the property to one Gill, in whose possession it was when the seizure was made:—Held, that the above description was not suffi-

cient, and that the articles could not be seized under the writ while they were in the possession of a party not named therein. Plaintiff was allowed to amend the description and substitute or add Gill as a defendant. *Hoorigan v. Driscoll*, 8 P. R. 184.—Dalton, Q. C.

Actions of replevin are not within the general provisions of Orders 1 and 2, and the practice and pleadings therein are within the exception of Rule 4. A statement of claim filed in such an action was therefore set aside, and the plaintiff allowed to declare according to the old practice. *Campan v. Lucas*, 9 P. R. 142.—Dalton, Master.

In an action of replevin ten days' notice of trial must be given, instead of eight days, as under the old practice. *Wallace v. Cowan*, 9 P. R. 144.—Dalton, Master.

See *Bradley v. Clarke*, 9 P. R. 410, p. 248.

IV. REPLEVIN BOND.

In replevin a County Court Judge made an order when the writ was granted, directing the sheriff to seize the goods and hold them subject to requisition by the plaintiff to replevin to him. The sheriff seized the goods, but did not take a bond as directed by R. S. O. c. 53, s. 11:—Held, that this order did not do away with the necessity of taking a bond, and the seizure was set aside, with costs to be paid by the sheriff. *Lawless v. Radford*, 9 P. R. 33.—Dalton, Master.

See *Bates et al. v. Mackey*, 1 O. R. 34, p. 705.

REPORT OF MASTER.

See PRACTICE.

RESIDUARY ESTATE.

See WILL.

REVIEW.

See PRACTICE.

REVISION (COURT OF.)

See ASSESSMENT AND TAXES.

REVIVOR.

See SCIRE FACIAS AND REVIVOR.

RIDEAU CANAL

See *Tylee v. The Queen*, 7 S. C. R. 651, p. 599.

RIGHT OF WAY.

See WAY.

RIPARIAN PROPRIETORS.

See WATER AND WATER COURSES.

RIVERS.

See WATER AND WATER COURSES.

ROADS AND ROAD COMPANIES.

See WAY.

RULES AND ORDERS.

I. REGULÆ GENERALES, 707.

II. GENERAL ORDERS OF THE COURT OF CHANCERY, 707.

III. RULES UNDER THE JUDICATURE ACT, 1881, 708.

IV. SUPREME COURT RULES, 711.

V. IN COURT OR CHAMBERS—See PRACTICE.

I. REGULÆ GENERALES.

R. G., H. T., 26 Geo. III.—See *Golding v. Mackie*, 8 P. R. 237, p. 51.

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SALE OF GOODS.

I. STATUTE OF FRAUDS, 711.

II. ACTIONS FOR NONDELIVERY OR NON-ACCEPTANCE, 712.

III. CONTRACT OF SALE, 713.

IV. WHEN PROPERTY PASSES TO BUYER, 714.

V. ACCEPTANCE AND RECEIPT, 715.

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VII. BY PARTICULAR PERSONS.

1. *Agents*—See PRINCIPAL AND AGENT.

2. *Corporations*—See CORPORATIONS.

VIII. REPLEVIN ON SALE OF GOODS—See REPLEVIN.

I. STATUTE OF FRAUDS.

Defendant sold to plaintiffs a quantity of tea, agreeing if there was any left on plaintiffs' hands at a certain date, he would take it back at the advanced price of ten cents per pound:—Held, an entire agreement consisting of one conditional contract of sale, and not of two contracts; and that consequently the delivery of the goods by the defendant satisfied the statute of frauds, and the plaintiffs were entitled to recover for the defendants refusal to take back the quantity left unsold. *Lumsden et al. v. Davis*, 46 Q. B. 1.

K. entered the sale of certain groceries in a book which was not produced, but the plaintiff produced a list of the things ordered, and their prices; and K. afterwards sent the order in a letter signed by him to the defendants, who thereupon wrote the plaintiffs, "K. reports a sale that we cannot approve in full, but will accept for," enumerating certain articles. Upon the plaintiffs' insisting on the completion of the order in full the defendants cancelled it altogether:—Held, that the letters were a sufficient memorandum within the 17th section of the Statute of Frauds. *Ockley et al. v. Masson et al.*, 6 A. R. 108.

The contract was expressed to sell "Limits Nos. 1 and 3 for \$15,500; also all the plant used

in connection with the shanty now in operation in Limit No. 1, included in the list made out last summer, and the material then not included which had been in use for the winter's operations of 1880 and 1881," at the price of \$3,000:—Held, sufficiently definite to satisfy the statute of frauds since the plant referred to therein could easily be identified by parol evidence as being that specifically described in a certain writing, which accompanied the above contract, and which was signed in the firm's name and by the purchaser, as also could the terms of credit to be allowed as to the payment of the \$15,500, and such parol evidence was admissible, though the contract imported *prima facie* a down payment of the \$15,500. *Reid v. Smith*, 2 O. R., Chy. D. 69.

II. ACTIONS FOR NONDELIVERY OR NON-ACCEPTANCE.

On the 7th May, 1874, the appellant sold to the respondent 500 tons of hay. The writing, which was signed by the appellant alone, was in following terms: "Sold to G. A. C. 500 tons of timothy hay of best quality, at the price of \$21 per ton f. o. b. propellers in canal, Montreal, at such times and in such quantities as the said G. A. C. shall order. The said hay to be perfectly sound and dry when delivered on board, and weight tested if required. The same to be paid for on delivery of each lot by order or draft on self, at the Bank of Montreal, the same to be consigned to order of Dominion Bank, Toronto." In execution of this contract, the appellant delivered 147 tons and 33 pounds of hay, after which the respondent refused to receive any more. The appellant having several times notified the respondent, both verbally and in writing, by formal protest on the 28th July, 1874, requested him to take delivery of the remaining 354 tons of hay. On the 11th of November following, the appellant brought an action of damages for breach of contract, by which he claimed \$3,417.77, to wit, \$2,471 difference between the actual value of the hay at the date of the protest and the contract price, and \$946.77 for extra expenses which the appellant incurred, owing to the refusal of the respondent to fulfil his contract:—Held, that such a contract was to be executed within a reasonable time, and that, from the evidence of the usage of trade, the delivery, under the circumstances, was to be made before the new crop of hay, and that the respondent, being in default to receive the hay when required, was bound to pay the damages which the appellant had sustained, to wit, the difference at the place of delivery between the value when the acceptance was refused and the contract price, and other necessary expenses, the amount of which, being a matter of evidence, was properly within the province of the court below to determine. *Chapman v. Larin*, 4 S. C. R. 349.

The defendant company agreed to purchase from the plaintiff a quantity of iron called "Depere" iron, the plaintiff to deliver the same as the defendants should require for their works. The plaintiff subsequently, without any requisition from the defendants, shipped to them nearly the whole quantity agreed for, of another brand of iron, manufactured by a different company, though using the same ore and fuel and making

the same grade of iron as the Depere Company. The defendants refused to accept the iron offered:—Held (affirming 31 C. P. 475) that the defendants were not bound to accept the iron so tendered, neither could the plaintiff recover the value thereof, the iron being a different article from that contracted for. *Hedstrom v. Toronto Car Wheel Company*, 8 A. R. 627.

The plaintiffs agreed to deliver to the defendant from 1300 to 1500 tons of old iron rails—"cash on delivery of each 100 tons, or with privilege of drawing against them as may be agreed on between us as they are shipped." On 17th February, 1880, the plaintiffs having delivered 1150 tons sent an account of shipments, drew for \$1,500, which the defendants on the 21st refused to accept, erroneously, as they afterwards admitted, asserting that two carloads, price \$333, had not been received, and adding, "You should deliver the balance due on contract before asking us to pay any more money. The time has so far gone by the date when we expected the whole amount that we think it not unreasonable to ask this." There was a silence for some time, though the parties were in correspondence about another contract, and on the 5th June, 1880, the plaintiffs wrote: "We shall now soon be able to complete the delivery of the old rails," and they went on to refer to the contemplated contract. In answer, the defendants' agent referred to the other contract, but said nothing about the completion of the present one. On 20th August, the plaintiffs again drew for the price of the amount delivered, and acceptance was refused for the same reasons as before. The plaintiffs sued for the price of the iron delivered, and the defendants counter-claimed for damages for the non-delivery of the difference between the iron delivered and 1300 tons:—Held, reversing the judgment of Osler, J., on this point, at the trial, Hagarty, C. J., dissenting, that the plaintiffs were not justified in treating the defendants' letter of the 21st and their conduct as shewing that they considered the contract at an end, and refused further performance of it, for they could not after the letter of the 21st February have sued for breach thereof, in not accepting the remaining 150 tons; and that while the defendants were liable for the price of the amount delivered, they were entitled to judgment on their counterclaim for damages caused by the failure of the plaintiffs to deliver the balance. *Midland Railway Co. v. Ontario Rolling Mills Co.*, 2 O. R., Q. B. D. 1. This case has been carried to appeal.

The plaintiffs claimed damages for non-acceptance of iron under another contract:—Held, per Osler, J., upon the evidence and correspondence set out in the case, that no concluded contract was shewn, and if it had been the plaintiffs could not have recovered; for 1. They had transferred the contract, and 2. They made default in delivery at the time agreed upon. *Ib.*

See *Exchange Bank v. Stinson*, 32 C. P. 158, p. 108.

III. CONTRACT OF SALE.

A contract for the sale of goods "to arrive" does not constitute a conditional contract rendering the vendor liable only on the condition of

the arrival of the goods, except perhaps where the goods are either in transit in a named vessel or about to be shipped at a named port in some particular manner. In this case, being a sale of iron to be made in Scotland, it was—Held, upon the evidence in the case, that the sale was absolute, and not subject to any condition as to the arrival of the goods. *Fleury v. Copland et al.*, 46 Q. B. 36.

By telegrams and letters the defendant offered to sell the plaintiff twelve cars of barley, to be delivered free on the track in Toronto at 66c. per bushel, of the quality of two cars previously shipped by the defendant to the plaintiff, subject to inspection by the plaintiff at his own expense at Landsdowne. The plaintiff telegraphed, "All right, will take the lot. Ship one car on receipt—quick." By letter of same date the plaintiff said that this might save the necessity of his sending down to inspect, as if this car was all right he need not do so. The car was sent by the defendant, who, however wrote at once, when advising of the shipment, that the only way he would sell would be to have the barley inspected at his grain house. Defendant drew on the plaintiff for the price of the car sent, which was paid. The plaintiff did not inspect, but after receiving this car, the plaintiff wrote and telegraphed to defendant to ship the balance but defendant refused to do so:—Held, Cameron, J., dissenting, that the contract was subject to the condition stipulated for by the defendant, that the plaintiff should inspect before shipment; and that the shipment of one car, with the letter accompanying it, was not a waiver of the condition for inspection at Landsdowne of the residue, which the defendant was therefore not bound to deliver. *Goodall v. Smith*, 46 Q. B. 388.

See *Ockley et al. v. Masson et al.*, 6 A. R. 108, p. 243.

IV. WHEN PROPERTY PASSES TO BUYER.

M. agreed to manufacture and furnish to the joint account of himself and the plaintiff a quantity of staves to be loaded in cars at railway station by a day named. By the terms of the agreement the staves were to be considered at all times, whether marked or not, the property of the plaintiff as security for advances:—Held, that under this agreement the staves became the property of the plaintiff as soon as made, and never were the property of M.; and that the agreement did not require filing under the *Chattel Mortgage Act*; and that the plaintiff therefore was entitled as against an execution creditor of M. *Kelsey v. Rogers et al.*, 32 C. P. 624.

The plaintiff consigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made certain payments. Without making such payments, however, A. sold the oil without the knowledge of the plaintiff:—Held, (following *Walker v. Hyman*, 1 A. R. 345,) that the plaintiff was entitled to recover from the purchaser the price of the oil, although his purchase had been made in good faith and without any notice of the stipulation between the plaintiff and A. *McDonald v. Forrestal*, 29 Chy. 300.

M. by false representations induced T. to sell him a horse, buggy and harness, and to take for

them two promissory notes. T. having discovered the fraud, went and demanded back his goods, at the same time throwing the notes on the table. On the assurance of M., however, that on the following Tuesday he would bring the property or satisfaction, T. again took the notes and went away. M. did not appear as he had promised, and T. sued out a writ of replevin against M. but before it had been executed M. sold the property to the plaintiff, an innocent purchaser who having been deprived of it under the replevin, brought trover against the sheriff:—Held, that the plaintiff was entitled to recover; that the contract had not been disaffirmed when the writ of replevin issued, and that the mere issue of it was no notice to M. of disaffirmance, and could not affect the plaintiff. *Stoeser v. Springer*, 7 A. R. 497.

G. had recovered a judgment against his father for costs in an action instituted by the latter, and under the execution issued thereon seized a horse as the property of the father in the possession of the plaintiff A., another son. It was shewn that several years before the father had agreed to convey his farm to A. and another brother W., both of whom assumed possession and control of the property before any conveyance was executed, and so continued in possession, the father continuing to reside on the place with the two sons, part of the consideration for the conveyance being that they should support him. The sons also bought the chattel property from their father, the horse in question having been purchased by A. for \$50, and this he kept upon the premises, as had always been done, using him in the work of the farm, and occasionally working for others with him for hire, the father sometimes using him for his own purposes. On this state of facts, the judge of the County Court of Hastings in an interpleader issue, left the question of property to the jury, who found a verdict for A. The court being of opinion that the claim of G. having arisen long after the alleged sale of chattels, it would require a preponderance of evidence in favour of G., to induce the court to interfere with the finding of the jury (but which did not exist) refused to disturb the conclusion of the judge as to the finding of the jury, and dismissed an appeal, with costs. *Danford v. Danford*, 8 A. R. 518.

See *Steele v. The Grand Trunk R. W. Co.*, 31 C. P. 260, p. 103.

V. ACCEPTANCE AND RECEIPT.

The defendants, with the knowledge that a consignment of goods was in excess of the quantity ordered by them, made no objection on that ground though negotiations took place for a reduction in price, on account of delay, &c., but took into stock 15 out of 25 cases sent. The other 10 cases remained in bond till they were sold to pay duties:—Held, that there was evidence on which a waiver of any objection as to the excess was properly found. *Goodyear Rubber Co. v. Foster et al.*, 1 O. R., Q. B. D. 242.

SALE OF LAND.

I. STATUTE OF FRAUDS, 716.

II. CONTRACT OF SALE.

1. *Construction*, 717.
2. *Delivery of Possession*, 718.
3. *Interest and Taxes*, 718.
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III. TITLE.

1. *Incumbrances.*
 - (a) *How far a Defence to Actions on Mortgages for the Purchase Money*, 720.
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2. *Cloud on Title*, 722.
3. *Covenants for Title*—See COVENANTS FOR TITLE.
4. *Effect of Notice under the Registry Acts*—See REGISTRY LAWS.
5. *Compensation for Improvements under Mistake of Title*—See IMPROVEMENTS ON LAND.
6. *Quieting Titles*—See QUIETING TITLES ACT.
7. *Applications under R. S. O. c. 109*—See VENDORS AND PURCHASERS ACT.

IV. PREPARATION AND TENDER OF CONVEYANCE. 723.

V. SALES FOR TAXES—See ASSESSMENT AND TAXES.

VI. SALE OF CROPS—See CROPS.

VII. CROWN LANDS—See CROWN LANDS.

VIII. UNDER EXECUTION—See EXECUTION.

IX. FRAUD IN CONVEYANCE OR SALE OF LAND—See FRAUD AND MISREPRESENTATION.

X. MARRIED WOMAN'S PROPERTY—See HUSBAND AND WIFE.

XI. INFANT'S ESTATE—See INFANT.

XII. UNDER POWER OF SALE—See MORTGAGE.

XIII. UNDER ORDER OF THE COURT—See SALE OF LAND BY ORDER OF THE COURT.

XIV. OF TIMBER—See TIMBER.

I. STATUTE OF FRAUDS.

Where a written agreement for the sale of land contained the following condition of sale: "The vendor shall have the option of a reserved bid which is now placed in the hands of the auctioneer," and the reserve bid was worded as follows: "Re sale of Allan Wilmot's farm, reserved bid, \$105 per acre:—Held, that the above words, even though read together as they should be, did not so identify the vendor as to satisfy the statute of frauds. "Vendor" is not a

sufficient description of the party selling to satisfy the requirements of the said statute. *Wilnot v. Stalker*, 2 O. R., Chy. D. 78.

A., whose wife owned a certain freehold property on St. George street, wrote to B. the owner of a certain leasehold property on King street, with reference to the said properties, as follows: "If you will assume my mortgage, and pay me in cash \$3,700, I will assume your mortgage of \$5,000 on the leasehold:" and B. replied, "Your offer of this date, for the exchange of my property on King street for your property on St. George street, I will accept on your terms:"—Held, affirming the judgment of Ferguson, J. (2 O. R. 609) not a sufficient memorandum of the contract to satisfy the statute of frauds. (*Armour, J.*, doubting). *McClung v. McCracken et ux.*, 3 O. R., Q. B. D. 596.

In letters written by the solicitor of a purchaser of land sold at auction it was stated that the advertisement of sale had represented that twenty acres of the land purchased from the defendant had been cleared and fenced, whilst the fact was no fencing whatever remained on the premises, and by reason thereof claimed compensation, and in his answers thereto the defendant did not deny the fact of sale and purchase, but disputed the right to compensation:—Held, affirming the decree of the Court of Chancery (28 Chy. 207,) a sufficient admission of the fact stated to take the case out of the statute of frauds, although no contract of sale had been signed by the vendor. *Stammers v. O'Donohoe*, 8 A. R. 161. Affirmed by Supreme Court. See 20 C. L. J. 260.

Although a vendor is allowed great latitude in the statements or exaggerations he may make as to the general qualities and capabilities of land he is about to offer for sale, still he will not be permitted to make direct misstatements and misrepresentations as to matters of fact which would naturally have the effect of inducing parties resident at a distance to bid for the property. *S. C.*, 28 Chy. 207.

See also "SPECIFIC PERFORMANCE," I. 1, p. 738.

II. CONTRACT OF SALE.

1. Construction.

An agreement for the purchase of certain land, after providing for the payment of a certain portion of the purchase money, continued as follows: "The remaining \$1,900 (after deducting the amount due to the Crown), payable in instalments of \$100 each, without interest, on 1st April in each year, during nineteen years," and the purchaser to secure by mortgage "the residue or sum of \$1,000 (less the amount due to the Crown) payable as aforesaid." It was not then known exactly how much was due to the Crown, but it was soon after ascertained to be \$364:—Held, the true meaning of the above agreement was that the amount due to the Crown was to be subtracted from the \$1,900, and the balance paid in instalments of \$100 each on 1st April in each year until the whole of such balance should be paid. *Wolffe v. Hughes*, 1 O. R., Chy. D. 322.

By an agreement for the sale of land for \$60,000, \$4,000 was to be paid on the execution of the agreement, \$40,795 within sixty days thereafter,

and the balance to remain on mortgage. The purchasers paid the \$4,000 but refused to pay the \$40,795, to recover which this action was brought:—Held, that the provision as to the mortgage not stating when it was to be payable did not render the agreement void for uncertainty:—Held, also, that the plaintiff could recover the \$40,795 without tendering a conveyance of the land, for that his right thereto was an independent right, and not a concurrent act with the tendering such conveyance; and at all events it was the purchaser's duty to prepare and tender the conveyance: that it was unnecessary for the plaintiff to aver and shew that he had a good title, for he was only required to make a good title when he could be called upon to do so, which could not be until the last instalment was demanded or defendant shewed his readiness and willingness to arrange that according to the contract; and that it was therefore no defence to aver that the plaintiff could not give a good title. *McDonald v. Murray et al*, 2 O. R., C. P. D. 573.

See *VanKoughnet v. Denison*, 1 O. R. 349, p. 182; *McKenzie v. Dwight*, 2 O. R. 366, p. 720.

2. Delivery of Possession.

The delivery to a purchaser of a house of the key thereof is not of itself delivery of possession; it is but a symbolical delivery, and may be evidence of possession if given or received with that view. *The People's Loan and Deposit Co. v. Bacon*, 27 Chy. 294.

Merely obtaining the keys of a building in order to view the premises, so as to estimate alterations intended to be made, and to perform other acts to preserve the premises from deterioration, is not such a taking possession under a contract for sale as will bind the purchaser and render him liable to pay interest on the purchase money. What will be a sufficient taking of possession of a purchased house considered and treated of. *Id.*

By one of the conditions of sale the purchaser was required to pay a deposit of ten per cent, at the time of sale and the remainder within one month thereafter, and upon such payment the purchaser was to be entitled to a conveyance and to be let into possession of the property purchased:—Held, that under this condition the payment of the purchase money by the purchaser and the delivery to him by the vendor of possession were concurrent acts, and unless the vendor was in a position to put the purchaser in possession he could not be called upon to pay interest on the unpaid purchase money. Neither was he bound in such a case to pay ground rent accruing due upon the property whilst he was so kept out of possession. In such a case, letting a purchaser into receipt of rents and profits is not a compliance with the condition to give the purchaser possession. Under such circumstances the purchaser was held entitled to make a deduction of a proportionate share of the taxes assessed on the premises for the year in which the sale was effected. *Id.*

3. Interest and Taxes.

See *The People's Loan and Deposit Co. v. Bacon*, 27 Chy. 294, *supra*; *Harrison v. Joseph*, 8 P. R. 293, pp. 724, 725.

4. Rescinding on the Ground of Fraud.

The defendant and his brother partitioned their lands, defendant taking the west half of a lot, on which was an hotel, and the brother, the east half, on which a store was erected, each supposing that the division line ran between the two buildings. The defendant sold his portion to the plaintiff, who had lived opposite for many years, the land being described as the west half according to a plan. The hotel encroached upon the east half at the rear end of the building about thirty-four inches, the value of the land encroached upon being very trifling. It appeared that the hotel could be moved for about \$40; and that defendant had offered to procure a lease of the portion encroached upon at a nominal rent, which was refused. The plaintiff charged that the defendant had falsely and fraudulently represented that the division line between the two lots ran between the two buildings, and brought an action therefor, praying for a rescission of the sale, for an account of her improvements made, and for damages. The deed was drawn after the alleged misrepresentation and after the plaintiff knew of the encroachment, and nothing was then said about the line. The learned judge at the trial found that there was no false representation, but he added defendant's brother as a party, and directed him to convey to the plaintiff the land encroached upon:—Held, that the action could not be maintained, for, among other reasons, the plaintiff knew of the encroachment when he took the conveyance, which made no provision respecting it; and she had so dealt with the property as to preclude her from claiming a rescission:—Held, also, that under the circumstances, more fully stated in the report of the case, the brother should not have been added; and the plaintiff, having based her action on the ground of fraud, should not be allowed to rely upon an entirely different ground. *Dunbar v. Meek*, 32 C. P. 195.

The defendant was assignee of a land warrant issued to a constable of the North-West Mounted Police Force, for service in that body, which entitled him upon its face to locate 160 acres upon any of the dominion lands, subject to sale at \$1 per acre. The defendant induced the plaintiff to purchase the warrant by representing to him that he would be entitled to obtain from the government 160 acres of land. There were lands subject to sale at \$1 per acre when the warrant was issued and thereafter. By various statutes and orders in council the dominion lands were made subject to sale at higher prices than \$1 per acre, but these land warrants were to be accepted by the government in part payment of \$1 per acre. The plaintiff was refused lands at \$1 per acre by the crown, and then brought this action to rescind the sale to him on the ground of the misrepresentation. The jury found that defendant represented to plaintiff, to induce him to purchase, that the warrant would entitle him to 160 acres of land; that the plaintiff purchased on the faith of this; that the representation was false; and that defendant made it without knowing whether it was true or false, intending it to be relied upon:—Held, *Armour, J.*, dissenting, that the plaintiff must fail; for the construction of the warrant clearly expressed that the holder was entitled to 160 acres of land at \$1 per acre, and not simply to a credit of \$160 on a purchase and the representation was such as defendant

might properly make. *Per Armour, J.*—The representation that the warrant would entitle the plaintiff to 160 acres of land comprehended the affirmation of fact by the defendant that there were then dominion lands subject to sale at \$1 per acre, and this not being so the plaintiff should succeed. *McKenzie v. Dwight*, 2 O. R., Q. B. D. 366.

III. TITLE.

1. Incumbrances.

(a) *How Far a Defence to Actions on Mortgages for the Purchase Money.*

Where on the sale and conveyance of land the existence of an incumbrance is concealed by the vendor, who covenants against incumbrances: and the purchaser executes a mortgage to secure a balance of unpaid purchase money, the court will restrain an action to enforce payment of such mortgage, brought at the instance of the mortgagee—or the voluntary transferee—unless the amount of the incumbrance so concealed is deducted from the sum secured by such mortgage. This principle was applied in a case where the purchaser was a married woman, and her husband had joined in and executed the mortgage, by which he covenanted to pay the amount secured thereby, although the covenant against incumbrances was to the wife and not to the husband, the covenantor, himself. *Lovelace v. Harrington*, 27 Chy. 178.

(b) *Purchase Subject to Mortgage.*

Where a purchaser of a portion of an estate subject to mortgage gave a covenant to pay a proportion of the mortgage money, and a bill was filed by the vendor's assignee to compel payment by the purchaser the court refused to give such relief except upon the terms of the vendor's share of the mortgage debt being paid at the same time, although there was no covenant on the part of the vendor that he would pay. But the court refused to include a direction that the payment by the purchaser of his share should be conditional on the payment by other and independent purchasers of other parts of the estate of their shares of the sum due. In such a case, however, it would seem that any of such purchasers paying the amounts properly payable by others would be entitled to use the name of the plaintiff in proceeding against such defaulting purchasers, upon indemnifying him against costs. *Clemow v. Booth*, 17 Chy. 15.

A vendor of lands, which were subject to incumbrances created by himself, covenanted with his vendee to pay off the incumbrances, and discharge the lands sold from them. The vendee subsequently mortgaged the lands to the plaintiffs, with the usual mortgagor's covenants. In a suit by plaintiffs seeking (amongst other things) to have the lands relieved of the incumbrances:—Held, that the plaintiffs were entitled to the benefit of the vendor's covenant, and he was ordered to discharge the incumbrances, and pay the costs of the incumbrancers. *Clark v. Bogart*, 27 Chy. 450.

Several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs with

the usual mortgagor's covenants. He afterwards conveyed another parcel to S., who, when he took his conveyance, was not aware of the plaintiffs' mortgage, but it was registered against the parcels embraced in it, though not against the other parcels:—Held, (1) That the plaintiffs were entitled to require as between them and S. that the parcel conveyed to the latter should be resorted to for the satisfaction of the prior mortgage before recourse should be had to the parcels embraced in the plaintiffs' mortgage. (2) That the registration of the prior mortgage against the parcel bought by S. was notice to him of the right of persons who purchased other parcels before he purchased to throw the mortgage upon his parcel, and that S. was affected with notice of the plaintiffs' mortgage, and the right it conferred. *Ib.*

The plaintiff purchased a house and lot from defendant for \$2000, paying \$1000 in cash, and assuming a mortgage to a building society "on which \$664 is yet unpaid," and giving a mortgage to the defendant for the balance. The defendant covenanted that he had not incumbered, save as aforesaid. Subsequent inquiries shewed that there were due the society seventy-one monthly instalments of \$16.75, in all \$1189.25, and the plaintiff insisted that she was entitled to credit from the defendant for the difference between \$664 and the latter sum. But:—Held, that the plaintiff was entitled to retain in his hands only the cash value of the mortgage at the date of his purchase, if the society would accept it, if not then such a sum as, with interest on it, would meet the accruing payments. The defendant by his answer admitted an error in the computation of the amount due the society, and offered to pay the difference between the \$664 and what he alleged was the cash value and costs up to that time:—Held, that in the event of the society accepting present payment of the cash value, the defendant was entitled to his costs of suit, subsequent to answer. *Stark v. Shepherd*, 29 Chy. 316.

M. conveyed land to the plaintiff subject to a mortgage to the T. & L. Co. for \$2,000, and one to C. for \$500, which the plaintiff covenanted to pay and save M. harmless therefrom. The plaintiff then conveyed to the defendant in consideration of "\$1,050 and assuming the payment of the mortgages" aforesaid. The defendant gave back a mortgage for the balance of purchase money. He went into possession and paid some interest on the T. & L. Co. mortgage. Subsequently a new arrangement was made, and the defendant's mortgage was discharged, and a mortgage for \$1,850 was given by the defendant to the plaintiff, which included the amount of three promissory notes for \$350 and other items, besides the balance of the purchase money. There was no covenant for payment therein. The T. & L. Co. mortgage fell due and was not paid, and the plaintiff paid C.'s mortgage of \$500:—Held, that the defendant was bound to pay off the T. & L. Co. mortgage and relieve the land therefrom, and indemnify the plaintiff against it if personally liable thereon. *Canavan v. Meek*, 2 O. R., Q. B. D. 636.

M., who was the owner of Whiteacre and Blackacre, both subject to incumbrances of \$1,600 and \$500, sold Whiteacre to C. subject to the \$1,600 mortgage, with covenants for title, save as to that mortgage, the mortgage debt in reality being

the consideration or purchase money therefor. M. afterwards sold Blackacre to N., subject to the \$500 mortgage, which conveyance also contained absolute covenants for title, the payment of the \$500 being taken as part of the consideration. Default having been made in payment of the \$1,600 mortgage, the mortgagee proceeded to a sale under the power, and N. became the purchaser of both parcels with a view of protecting himself, and thereupon took proceedings to compel M. and the representatives of C. to pay the amount due on the \$1,600 mortgage:—Held, affirming the judgment of the court below (28 Chy. 334), that there was not any privity between the plaintiff and C.'s representatives, and that the demand remained with M., the original vendor, against C.'s estate. *Norris v. Meadows*, 7 A. R. 237.

See *Kempt v. Macauley*, 9 P. R. 582, p. 165.

(c) Discharge of, by Vendor.

A vendor agreed to pay off a mortgage existing on the property, and the decree directed a good and sufficient conveyance "according to said agreement." The defendant, the vendor, neglected to pay off the mortgage, and the plaintiff thereupon moved upon petition to amend the decree by ordering the defendant to obtain a discharge of such incumbrance; but the court (Boyd, C.) directed that the vendor pay off the mortgage within a limited time, or in default, that the purchaser should be at liberty to do so, procure an assignment, and have his remedy against the vendor, whose conveyance he was not bound to accept till this mortgage was paid off; the purchase money in court to be applied pro tanto thereto:—Held, also, that as the matter had been referred to the master by the decree, which was for specific performance, it should have been disposed of in his office under G. O. 226. *Stammers v. O'Donohoe*, 29 Chy. 64.

2. Cloud on Title.

A bill alleged that a mortgage was executed by W. to the defendant in consideration of \$450, that defendant advanced only \$150 thereon, and W. being entitled to receive the balance assigned such right and conveyed his equity of redemption to the plaintiff. That the defendant refused to pay the balance and claimed to hold the mortgage as security for \$450. The prayer was for specific performance or, in the alternative, a declaration of the above facts, and for general relief. At the hearing, the learned judge allowed a demurrer ore tenus, on the ground that an agreement to lend money could not be specifically performed:—Held, reversing this judgment, that upon the facts alleged in the bill, namely, that the mortgage was being held for more than had been advanced thereon and therefore to that extent formed a cloud on the title, the plaintiff would be entitled to a declaration to that effect, and appropriate relief; and as the demurrer admitted the truth of the allegation it should have been overruled. *Calvert v. Burnham*, 6 A. R. 620.

S., believing that his father (still living, but of unsound mind) was entitled to certain lands to which the plaintiffs claimed title, took the advice

of his solicitor, C., who, being advised by counsel, instructed by S., prepared and registered an instrument, whereby he, S., stated that he claimed the lands, and would upon the demise of his father commence proceedings for their recovery. The plaintiffs were thus obstructed in the sale of their lands, and brought an action against S., C., and the Registrar, to remove the instrument from the register, as being a cloud on the title, and for damages. Proudfoot, J., dismissed the action as against the registrar, but gave judgment, with a reference to assess damages, against S. and C., (4 O. R. 473):—Held, that the Registry Act did not authorize the registration of such an instrument: and, Cameron, J., dissenting, that an action would lie for its removal. *Ontario Industrial Loan and Investment Company v. Lindsey et al.*, 3 O. R., Q. B. D. 66.

The plaintiff was owner in fee of certain lands which were conveyed to him by deed of 27th July, 1868, registered 11th August, 1868. Subsequently, by mistake, the said lands were sold for taxes, although no taxes were actually in arrear; and by deed of 11th March, 1880, were conveyed to A. McL., the tax purchaser, which deed was registered 18th May, 1880. On 29th November, 1881, A. McL., conveyed the said lands to J. W. by deed absolute in form, but intended as security for money advanced by J. W., which deed was registered 1st December, 1881. The plaintiff found out that this sale for taxes had taken place shortly before bringing this action, in which he sought the cancellation of the deeds to McL., and J. W.:—Held, that the plaintiff was entitled to have the deeds cancelled, and J. W. was entitled to judgment against A. McL., for the moneys advanced by him. *Charlton v. Watson et al.*, 4 O. R., Chy. D. 489.

IV. PREPARATION AND TENDER OF CONVEYANCE.

See *McDonald v. Murray et al.*, 2 O. R. 573, p. 718.

SALE OF LAND BY ORDER OF THE COURT.

I. BIDDINGS, 724.

II. TENDERS, 724.

III. TITLE, 724.

IV. TAXES, 724.

V. PURCHASE MONEY.

1. *Payment into Court*, 724.
2. *Interest*, 725.
3. *Abatement of*, 725.
4. *Application of*, 725.
5. *Return of Deposit*, 726.

VI. VESTING ORDER, 726.

VII. GIVING UP PURCHASE, 726.

VIII. SETTING ASIDE SALE, 726.

IX. MISCELLANEOUS CASES, 726.

X. SALE OF MORTGAGED PREMISES—See MORTGAGE.

I. BIDDINGS.

A master has no power to give leave to bid to a party conducting a sale. Application must be made to the court. *Re Laycock—McGillivray v. Johnson*, 8 P. R. 548.—Blake.

Liberty of trustee to bid at sale. See *Ricker v. Ricker*, 7 A. R. 282.

II. TENDERS.

On the reference under the decree in a mortgage suit, the plaintiff put in several affidavits as to the value of the property, \$3500 being the highest price named in them. The defendant did not file any affidavits in reply. The plaintiffs then tendered \$3500 for the property, which the master declined to accept without an order directing him to do so. The referee on application refused such order, and on appeal, Spragge, C., upheld his judgment. *Ramsay v. McDonald*, 8 P. R. 283.

III. TITLE.

In a sale under a decree:—Held, that the purchaser had no right to certified copies of registered and other documents procured at the expense of the vendors. *Harrison v. Joseph*, 8 P. R. 293.—Stephens, Referee.

Where a bill was served on a defendant personally, and about a year afterwards a final order of foreclosure was granted in the suit:—Held, that a purchaser was not entitled to insist on the plaintiff (the vendor) proving that the defendant was alive when the final order was made. *Henderson v. Spencer*, 8 P. R. 402.—Spragge.

See *McDermid v. McDermid et al.*, 8 P. R. 28, p. 725; *Laplante v. Scamen et al.*, 8 A. R. 557, p. 725.

IV. TAXES.

The purchasers claimed that the vendors should pay a proportion of the taxes for the year 1880 up to 6th March, when the title was accepted and possession given. The by-law for the collection of taxes in Toronto for 1880, was passed on the 2nd April, 1880, and provided that the taxes should be due and payable on 4th June, 1880, but that if an instalment was then paid, further payment by instalments might be made on the 15th July and 3rd September:—Held, that under R. S. O. c. 174, s. 347, and the terms of the city by-law, no taxes were due so as to form a charge on the land until 4th June, the date when the first instalment of taxes was due, and that the vendors therefore were not bound to pay any part of the taxes for that year. *Harrison v. Joseph*, 8 P. R. 293.—Stephens, Referee.

V. PURCHASE MONEY.

1. *Payment into Court*.

On a sale under a decree, the purchaser, except under special circumstances, will not be compelled to pay his purchase money into court until he has accepted or approved of the title.

or the master has reported that the vendor can make a good title. *McDermid v. McDermid et al.*, 8 P. R. 28.—Blake.

One of the defendants in a suit purchased the lands in question upon a sale under the usual decree for partition or sale. The appellant, the plaintiff, was first mortgagee, and the purchaser was second mortgagee of the interest of one S., the owner of an undivided sixth interest in the lands:—Held, that the purchaser was entitled to a conveyance from S. with the usual covenants for title as to his interest, and was not bound to accept a vesting order. Cameron, J., doubting, whether the question was not one of conveyance rather than one of title, and whether therefore the purchaser should not be ordered to pay his purchase money into court. Quære, whether the appellant, whose only interest was that of mortgagee of S.'s interest, had any locus standi to bring a suit for partition, or to appeal without his co-plaintiff. *Laplante v. Scamen et al.*, 8 A. R. 557.

(See also Sub-head V. 4, *infra*.)

2. Interest.

Where in a sale under a decree, no undue delay in investigating the title is attributed to either party, interest upon purchase money is payable only from the date of the acceptance of the title, and not from the time named in the conditions of sale. *Harrison v. Joseph*, 8 P. R. 293.

3. Abatement of.

Where land was advertised for sale under a decree, and the purchaser, the owner of the adjoining lot, who had also been in possession, by his son, of the advertised premises, tendered for them, knowing that the lands comprised fewer acres than the advertisement stated, and intending to seek an abatement after the purchase was completed, and a subsequent incumbrancer offered to give the same price for them as the purchaser:—Held, that the petitioner should be put to his election either to take the land without abatement of the purchase money, or to let it go to the subsequent incumbrancer. *Carmichael v. Ferris*, 8 P. R. 289.—Stephens, Referee—Blake.

4. Application of.

The bill was filed by a second mortgagee, the first mortgagee not being made a party. At a sale under the decree, M. purchased the land, and afterwards paid the purchase money into court; he then mortgaged the land, then conveyed his equity of redemption, and then took out a vesting order. Grant, a subsequent mortgagee, claimed payment of his claim out of the moneys in court. On the 19th November, on the application of M., the referee made an order, directing payment to the assignee of the first mortgagee of his claim out of the purchase money in court. It appeared that M. thought he was purchasing free from incumbrances, and was ignorant of the first mortgage. On appeal, Proudfoot, V. C., upheld the referee's order. *Fleming v. McDougall*, 8 P. R. 200.

See *Hyde v. Barton*, 8 P. R. 205, p. 222.

5. Return of Deposit.

At a sale under the standing conditions of sale of the court the purchaser paid ten per cent. of his purchase money, but made default in paying the balance, and on a re-sale the property brought \$25 more than at the first sale. Boyd, C., refused an application by the purchaser to have his deposit repaid to him, but as it appeared that the deposit would cover the expenses and costs incurred by the re-sale, he directed that the purchaser should not be required to pay them in addition. *Tilt v. Knapp et al.*, 9 P. R. 314.

VI. VESTING ORDER.

See *Fleming v. McDougall*, 8 P. R. 200, p. 725; *Hyde v. Barton*, 8 P. R. 205, p. 222.

VII. GIVING UP PURCHASE.

At a sale under a decree on the 25th March, 1879, A. purchased the land in question. On the 19th April, 1879, he transferred his interest to W., and on the 26th April, one H. purchased and took an assignment of the dower of one S. in the land. On the 16th February, 1880, A. applied to be released from the contract to purchase on the ground of the outstanding dower. The evidence shewed that S. had agreed with the heir-at-law to accept a gross sum in lieu of her dower, that W. really purchased the dower, but took the assignment in H.'s name, and that this application though in A.'s name, was really made by W.:—Held, that no relief could be granted, the applicant having himself created the obstacle by means of which he sought to prevent the sale being carried out. *Fraser v. Gunn*, 8 P. R. 278.—Spragge.

See *Tilt v. Knapp et al.*, 9 P. R. 314, *supra*.

VIII. SETTING ASIDE SALE.

Although a decree of sale should direct the same to take place with the approbation of the master, the omission of such direction is no ground for moving to set aside the sale under the decree, where the same really took place with such approbation, even in a case where infants are interested. *Ricker v. Ricker*, 27 Chy. 576; 7 A. R. 282.

See *Campion v. Brackenridge*, 28 Chy. 201, p. 50.

IX. MISCELLANEOUS CASES.

Where a decree directed a sale of certain property at the expiration of a year from the date of a master's report, a sale at the end of a year from the date of the decree, instead of the date of the report, was allowed under special circumstances, on the ground that the decree was in effect equivalent to a judgment at law. *Porte v. Irwin et ux.*, 8 P. R. 40.—Blake.

A purchaser at a sale under decree signed the usual contract to purchase, and paid the deposit. The next day the buildings on the property were burned down:—Held, by Proudfoot, V. C., on appeal, reversing the decision of Stephens, referee, 8 P. R. 166, that the loss would not fall on the

purchaser, as the interest contracted for did not vest in him till the report on sale was confirmed. *Stephenson v. Bain*, 8 P. R. 258.

SALOON.

See TAVERNS AND SHOPS.

SATISFACTION.

See ACCORD AND SATISFACTION.

SCHOOLS;

See PUBLIC SCHOOLS.

SCIRE FACIAS AND REVIVOR.

A plaintiff in an action for dower recovered judgment, but before the execution of the writ of assignment of dower, and after its issue, the tenant of the freehold died, having devised the land in question to the present defendant:—Held that the plaintiff must proceed against the devisee by scire facias, and not by suggestion or revivor. *Davis v. Dennison*, 8 P. R. 7.—Hagarty.

Held, that since the passing of 35 Vict. c. 12, s. 1, Ont., (R. S. O. c. 116,) the assignee of a judgment is entitled to revive the same in his own name by entering a suggestion on the roll. *Philips v. Fox*, 8 P. R. 51.—Dalton, Q. C.

An order of revivor was obtained in the cause on the ground that the sole plaintiff had assigned all his interest, &c., to one Close. The plaintiff applied to the court by petition to set aside the order, disputing the assignment on the allegation of which the order was obtained. Proudfoot, V. C., discharged the order of revivor with costs. *Fisken v. Ince et al.*, 8 P. R. 147.

See *Ross v. Pomeroy*, 28 Chy. 435, p. 425.

SCOTT ACT.

See CANADA TEMPERANCE ACT, 1878.

SCRUTINY.

See PARLIAMENTARY ELECTIONS.

SEAL.

CONTRACTS WITH CORPORATIONS—See CORPORATIONS.

The testimonium clause in a power of attorney declared that the principal set his hand and seal to the instrument. The attestation clause declared that it was signed and sealed in the presence of a subscribing witness, and opposite the signature of the principal was a visible impres-

sion made by the pen in the form of a scroll, in which was inscribed the word "seal:"—Held, a sufficient sealing of the document. *Re Bell and Black*, 1 O. R., Chy. D. 125.

SECURITY.

I. COLLATERAL—See COLLATERAL SECURITY.

II. FOR COSTS—See COSTS.

SEDUCTION.

Held, following *Hodsoll v. Taylor*, L. R. 9 Q. B. 79, that in an action for seduction evidence as to defendant's means is inadmissible; and that evidence of the kind having been received, defendant was not to be prejudiced in his application for a new trial because his counsel had, after having done his best to exclude the evidence, examined defendant on the same subject with a view to disproving the estimate placed on his means. *Ferguson v. Veitch*, 45 Q. B. 160.

Where an unmarried woman is seduced and pregnancy follows, or sickness which weakens or renders her less able to work or serve, the father's cause of action is complete, and cannot be divested by the subsequent marriage of his daughter before birth of a child. The facts of seduction, pregnancy, and illness might be proved by the daughter, but she might refuse to answer as to who was the cause of her pregnancy if she asserted that the child she bore was born in wedlock. *Evans v. Watt*, 2 O. R., Q. B. D. 166.

But where the daughter was married to a third person during her pregnancy consequent upon her seduction by the defendant, and her child was born in wedlock, and the action was brought at the instigation of the husband, he and his wife being the only witnesses, and no proof of sickness or inability to serve was given:—Held, (Armour, J., dissenting,) that a nonsuit was properly entered. Per Armour, J. If loss of service was necessary to be proved, a new trial should be granted for that purpose; and it cannot be said that under such circumstances a father sustains no damages apart from the loss of service. *Id.*

Held, affirming the judgment of Cameron, J. 9 P. R. 206, that under the Insolvent Act, 1864, sec. 9 sub-s. 5, a discharge in insolvency would form no answer to proceedings upon a judgment against defendant for seduction. *Beninger v. Thrasher*, 1 O. R., Q. B. D. 313.

Arrest under Ca Re.—See *Wheatly v. Sharp*, 8 P. R. 189, p. 334.

SEPARATE SCHOOLS.

See PUBLIC SCHOOLS.

SEQUESTRATION.

On moving for a writ of sequestration for a breach of an injunction, two clear days' notice of motion is sufficient. *Cook v. Credit Valley R. W. Co.*, 8 P. R. 167.—Blake.

Held, that a writ of sequestration could not issue, under Rule 339, on an ordinary common law judgment for a debt recovered before the passing of the Judicature Act, it not being an order for payment of a specific sum, and no day named for payment in it. The property sought to be sequestered, was property in the hands of five trustees under a will. Two of the trustees, one of whom was the judgment debtor and took a life interest in part of the property, resided within the jurisdiction, the other trustees resided out of the jurisdiction in St. John, N. B.:—Held, that service of a notice of motion founded on such writ of sequestration on such non-resident trustees was sufficient, though a judgment or decree founded upon it would not avail the plaintiffs in the courts of New Brunswick. *The London and Canadian Loan and Agency Co. v. Merritt*, 32 C. P. 375.

Semle, that under a writ of sequestration a debtor's choses in action can be reached. *Ib.*

SERVANT.

See MASTER AND SERVANT.

SERVICE OF PAPERS.

See PRACTICE.

SESSIONS.

I. CONVICTIONS.

1. *Amendment of*, 729.
2. *Appeals from Magistrates*, 729.
3. *Appeals from Sessions*, 730.

II. MANDAMUS TO—See MANDAMUS.

I. CONVICTIONS.

1. *Amendment of*.

Where an appeal was brought from a conviction imposing imprisonment with hard labour, which the magistrate had no power to award, and the sessions amended the record by striking out "hard labour." Held (Cameron, J., diss.), that their assuming so to amend the conviction was not a quashing of the conviction, and therefore trespass would not lie against the justices. *McLellan v. McKinnon*, 1 O. R., Q. B. D. 219.

Per Armour, J., the General Sessions of the peace have no power under 32-33 Vict. c. 31, to amend the sentence in a conviction as by striking out the part imposing hard labour, but can hear and determine an appeal on the adjudication of guilt only. Hagarty, C. J., inclined to agree, but gave no express decision on this point. *Ib.*

2. *Appeals from Magistrates*.

Held, that the prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint; as by R. S. O. c. 74, s. 4, the practice of appealing in such a case is

assimilated to that under Dom. Stat. 33 Vict. c. 47, which confines the right of appeal to the defendant. A prohibition was therefore ordered, but without costs as the objection to the jurisdiction had not been taken in the court below. *In re Murphy and Cornish*, 8 P. R. 420.—Osler.

3. *Appeals from Sessions*.

A conviction may be returned and proved at any time during the hearing of an appeal therefrom to the general sessions, or, in the discretion of the chairman, even during an adjournment for judgment. *In re Ryer and Plows*, 46 Q. B. 206.

A minute of conviction signed by the justice, but not sealed, was returned to the sessions, upon the entering of an appeal therefrom by the defendants. The jury found the defendant guilty of the offence of which he had been convicted, but on motion for judgment he objected that the conviction was not sealed. The chairman reserved judgment until a day named, and during the adjournment the justices returned and filed a conviction under seal. The chairman then declined to receive it, or to give judgment, holding that there was no conviction upon which to found the appeal, which had been heard:—Held, that the prosecutor was not entitled to a mandamus to compel him to deliver judgment; for the reception of the conviction in evidence at that period was in the chairman's discretion, which could not be reviewed. *Ib.*

On an appeal to the sessions from a conviction by a magistrate for breach of a municipal by-law, it is in the discretion of the chairman to grant or refuse a request for a jury, under 36 Vict. c. 58, s. 2, which is declaratory of the meaning of sec. 66 of the 32-33 Vict. c. 31, and is not confined to cases under the Acts mentioned in the preamble and title, which relates only to the desertion of seamen. *Regina v. Washington*, 46 Q. B. 221.

On the appeal the appellant tendered evidence and witnesses not heard on the trial before the magistrate which the chairman rejected, relying on 32-33 Vict. c. 31, s. 66, which, however, had been repealed by 42 Vict. c. 44, s. 10. The conviction was amended and affirmed, as and for a breach of a municipal by-law:—Held, that the appellant had the right, under either the Dominion Act, or R. S. O. c. 74, s. 4, which governed the case, to have such witnesses examined, and having been deprived of this right, the order of sessions should be quashed. *Ib.*

On an application to quash a conviction brought up upon certiorari, the court will not notice any facts not appearing in the conviction, for the purpose of impeaching it on any ground, except want of jurisdiction; nor has the court any power to review the decision of the sessions in a matter within their jurisdiction, nor to grant a mandamus to compel them to rehear an appeal. The court, refused, therefore, to quash a conviction under the Liquor License Act, affirmed on appeal, on the ground, among others, that the general verdict of guilty was inconsistent with the answers of the jury to specific questions. *Regina v. Grainger*, 46 Q. B. 382.

See *McLellan v. McKinnon*, 1 O. R. 219, p. 729.

SET-OFF.

I. IN INSOLVENCY PROCEEDINGS.—See BANKRUPTCY AND INSOLVENCY.

II. OF COSTS.—See COSTS.

III. PLEADING COUNTER CLAIM OR SET-OFF.—See PLEADING.

The plaintiff had recovered a verdict for \$600 against defendant for malicious prosecution, but judgment had not been signed thereon. At the same Assizes the defendant recovered a verdict against the plaintiff for \$380 on promissory notes, and signed judgment. The plaintiff almost immediately after its recovery assigned his verdict to his brother, but the court held this to be a device to prevent a set-off:—Held, that the defendant was entitled to have the plaintiff's verdict set-off pro tanto by entering satisfaction upon his judgment to the extent of the verdict, and paying the costs of suit; and it made no difference that the judgment had not been entered by the plaintiff. *Grant v. McAlpine*, 46 Q. B. 284.

A mortgagor and mortgagee dealt together for some years without having had any settlement of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off, in favour of the mortgagor for the balance due him on their general dealings:—Held, affirming the finding of the master, that such right of set-off passed to the official assignee of the mortgagor, and that a transferee of the security took it subject to the equity. *Court v. Holland*, 29 Chy. 19.

See *Culverwell v. Campton et al.*, 31 C. P. 342, p. 646.

SETTLED ESTATES ACT.

See *Re Smith's Trusts*, 4 O. R. 518, p. 234.

SETTLEMENTS.

MARRIAGE SETTLEMENTS.—See HUSBAND AND WIFE.

SEWERS.

See MUNICIPAL CORPORATIONS.

SHADE TREES.

See *Douglas v. Fox et al.*, 31 C. P. 140, p. 793.

[See 47 Vict. c. 36, Ont.]

SHERIFF.

I. ACTIONS AND PROCEEDINGS BY SHERIFF.

1. *Venue*, 732.

2. *Interpleader on Adverse Claims*.—See INTERPLEADER.

II. DUTY AND LIABILITY ON WRITS OF EXECUTION.

1. *Landlord's Claim for Rent after Seizure under Execution*, 732.

2. *In Bailable Proceedings*.—See BAIL.

3. *Property Liable*.

(a) *Under ff. fa. Goods or Lands*.—See EXECUTION.

(b) *For Arrears of Taxes*.—See ASSESSMENT AND TAXES.

III. FEES.

1. *When Office of Sheriff is Vacant*, 732.

2. *Poundage*, 733.

3. *Taxation of*, 733.

I. ACTIONS AND PROCEEDINGS BY SHERIFF.

1. *Venue*.

In an action wherein a sheriff is plaintiff or defendant, the opposite party, if he so desires, may have the action tried in the county adjoining that in which the sheriff resides. *Brannen v. Jarvis*, 8 P. R. 322.—Galt.

II. DUTY AND LIABILITY ON WRITS OF EXECUTION.

1. *Landlord's Claim for Rent after Seizure under Execution*.

Goods having been seized by the sheriff under execution, and claims having been made thereto by third persons, namely, chattel mortgagees, an interpleader summons was obtained by the sheriff. Notice was then given to the sheriff by the landlord of rent due, but no distress was issued or anything further done on his behalf. An interpleader order was made, and the claimants having failed to give the security required thereby, the goods were sold pursuant to the terms of the order, the landlord becoming the purchaser. They were never removed from the demised premises. The claimants were successful:—Held, that the statute 8 Anne c. 14, s. 1, only applies to the goods of the execution debtor, and not to those of third persons, against whom there must be a distress, notice to the sheriff not being sufficient; and that the sheriff selling incurred no liability, as he was secured under the interpleader order:—Held, also, that the sheriff is not liable when the goods have not been removed from the demised premises. The proceeds of the sale were therefore ordered to be paid out of court to the claimants. *Clarke v. Farrell*, 31 C. P. 584.

III. FEES.

1. *When Office of Sheriff is Vacant*.

The fees earned by a deputy sheriff while the office is vacant by reason of the death, resignation, or removal of the sheriff, of right belong to the deputy himself, and neither the representatives of the late nor the newly appointed sheriff have any right or claim thereto. *McKellar v. Henderson*, 27 Chy. 181.

In such a case where fees had been received by the deputy, and which the bill alleged he had in error paid over to the executors of the late sheriff, and the deputy subsequently voluntarily assigned all his right and claim to such fees to the newly appointed sheriff, who filed a bill to compel repayment of the amounts to him, the Court allowed a demurrer for want of equity. *Id.*

2. Poundage.

The poundage of a sheriff cannot be taken to cover more than the risk and responsibility cast upon him when he seizes, retains, and sells goods and from this levy returns the money. If the sheriff's action be intercepted, so that he does not make this money, it is for the Court to say what allowance shall be made him in lieu of poundage. *Wadsworth v. Bell*, 8 P. R. 478.—*Blake*.

Held, Wilson, C. J., dissenting, that a sheriff has no right to poundage upon an execution against lands, unless there has been an actual sale. *The Merchants Bank v. Campbell*, 32 C. P. 170.

Held, that the usual mode of computing sheriff's poundage is correct, namely, to allow six per cent. on the first \$1,000, and in addition thereto three per cent. on the amount over \$1,000, and under \$4,000; and in addition thereto one and a half per cent. on the amount over \$4,000. *Fleming v. Hall*, 9 P. R. 310.—*Dalton, Master*.—*Cameron*.

See *Morrison v. Taylor et al.*, 9 P. R. 390, *infra*.

3. Taxation of.

Where a sheriff's fees have been taxed before a deputy clerk of the Crown under R. S. O. c. 66, s. 43, a revision of such taxation cannot take place before the principal Clerk of the Crown; but the court may refer the bill back to the same deputy clerk for a revision of the taxation, where it appears that items have been improperly allowed. *Hay v. Drake*, 8 P. R. 120.—*Osler*.

Held, that a sheriff's bill of fees may be taxed on notice under sec. 43 of the Execution Act, R. S. O. c. 66, either at Toronto or in the sheriff's own county, as the party taxing may elect. *Dominion Type Founding Co. v. Nagle*, 8 P. R. 174.—*Armour*.

An execution and the judgment under which it issued were set aside on the ground of irregularity in obtaining the judgment:—Held, that the plaintiff was not entitled to have the sheriff's bill against him taxed under R. S. O. c. 66, s. 43, as the setting aside of the execution was not a "settlement by payment, levy, or otherwise," within the meaning of the Act, or under sec. 47, as the plaintiff was not a "person liable on any execution:—Held, however, that a sheriff, as an officer of the court claiming fees by virtue of its process, is so far within its jurisdiction that his bill may be taxed under Rule 447, O. J. Act:—Held, also, that this case, under the facts stated in the report, came within the provisions of R. S. O. c. 66, s. 45, and that therefore the sheriff was entitled to poundage. *Morrison v. Taylor et al.*, 9 P. R. 390.—*Cameron*.

Per Cameron, J. That the item of \$6 for taking stock was improperly allowed, not being incurred in the care and removal of the property, within the tariff. *Id.*

SHIP.

- I. APPLICATION OF IMPERIAL STATUTES, 734.
- II. OWNERS AND MORTGAGEES, 734.
- III. LIABILITY AS CARRIERS, 736.
- IV. MASTER, 736.
- V. BILLS OF LADING—See BILLS OF LADING AND WAREHOUSE RECEIPTS.
- VI. COLLISION, 736.
- VII. GENERAL AVERAGE, 737.
- VIII. ASSESSMENT OF SHIPS, 737.
- IX. MISCELLANEOUS CASES, 737.
- X. MARINE INSURANCE—See INSURANCE.

I. APPLICATION OF IMPERIAL STATUTES.

The defendant as administratrix of her husband, who lost his life by the foundering of a steamer called the *Waubuno*, belonging to the plaintiffs, on which he was a passenger, sued the plaintiffs to recover damages under R. S. O. c. 128. The plaintiffs, who claimed limited liability under sec. 54 of 25 & 26 Vict. c. 63, (Imp.) filed a bill under the Merchant Shipping Act 1854, 17 & 18 Vict. c. 104, s. 514, (Imp.) to restrain the action, and prayed that it might be determined by the court whether they were liable for loss of life or merchandise, and, if so, for what amount, and the persons entitled thereto:—Held, reversing the decree of Spragge, C., 27 Chy. 346, that the *Waubuno*, not having been registered under 17-18 Vict. c. 104 (Imp.) was not a British ship within the meaning of that Act, by virtue of the Statute of Canada 36 Vict. c. 128, and therefore not entitled to take advantage of the limitation clause; and that even if she were, the plaintiffs were not entitled to an injunction, as they did not admit their liability for damages to the extent mentioned in the Act, and bring into court or offer to secure the amount. *The Georgian Bay Transportation Co. v. Fisher*, 5 A. R. 383.

II. OWNERS AND MORTGAGEES.

Where certain persons, including G., advanced money to complete building a yacht at Cobourg, in order to sail for prizes at New York and Philadelphia, and scrip under seal was executed declaring that G. was to hold the yacht in trust as security for the advances; and G. incurred certain running expenses in taking the yacht to the race:—Held, that G. was entitled to a first charge on the proceeds of the sale of the yacht, for these expenses, as they had been incurred in prosecuting the enterprise for which the trust was created. *Burn v. Gifford et al.*, 8 P. R. 44.—*Taylor, Master*.—*Proudfoot*.

Plaintiff was mortgagee of 64 shares in a vessel belonging to defendant, and on the defendant's insolvency was allowed by the creditors and

the assignee to take her as she stood at a valuation. Defendant had previously removed from the vessel a piano and several other articles, and had substituted stoves for steam heaters:—Held, that in the absence of fraud, the plaintiff was concluded by the settlement with the assignee by which he took the vessel as she then stood, and could not recover these articles; and that the mortgagor, being in possession, was entitled to manage the vessel as he thought best, and to remove such articles upon his substituting others for them:—Semble, that a piano on board of a vessel would not pass to a mortgagee under the words “with her boats, guns, ammunition, small arms, and appurtenances.” *St. John v. Bullivant*, 45 Q. B. 614.

Semble, a mortgagee of a vessel until he takes possession or does something equivalent thereto, is not entitled to an account of the money earned by the vessel for freight, &c.; but, where in a suit by the mortgagees of a part owner of a vessel the defendant, the owner of the other shares, admitted that he was sailing the vessel for the joint benefit of himself and the other owners—other than the plaintiffs, though previous to the institution of the suit he had only asked for evidence that the agent of the plaintiffs really held the shares for them:—Held, that the fair inference was, that the defendant was sailing for whomsoever might be the owners or entitled to the earnings; and that having had sufficient information to acquaint him with the fact that the plaintiffs had acquired the shares either as mortgagees or owners he had thus recognized their right to demand an account. *Merchants' Bank v. Graham*, 27 Chy. 524.

Quære, whether co-owners of a vessel have a right to share in the profits thereof earned in ventures to which they do not assent, as a majority of the owners can employ the vessel against the will of the minority, who, however, can compel the majority to give a bond to restore the vessel in safety or pay the value of their shares. In such case the minority do not share the hazard, neither are they entitled to the benefit of the voyage. *Id.*

One C. entered into agreements with several parties to carry freights for them at certain named prices to be paid to the defendant—not mentioning any particular vessels in which the same were to be carried—and then agreed with the defendant, as part owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon. The defendant and C. both swore that the arrangement had not been made by C. as agent of the defendant, but for his own benefit:—Held, that the fact of the defendant having rendered an account in his own name and also sued for a portion of the freight, though aided by the other circumstances mentioned in the judgment, was not sufficient to countervail the positive denials of the defendant and C., that the contracts had not been made in behalf of and as agent for the defendant, freight being *primâ facie* payable to the master of a vessel, and the cargo need not be delivered by him until the freight thereof is paid; although in any other transaction such conduct would have been strong evidence that the defendant was the principal contractor. *Id.*

The plaintiffs who were mortgagees of a vessel, in exercise of a power of sale contained in their

security, on default of payment sold the interest of their debtor by auction, when the same was bought by one who held it in trust for the mortgagees:—Held, that the effect of such sale and purchase was, that the plaintiffs remained mortgagees only of the interest so sold. *Id.*

III. LIABILITY AS CARRIERS.

Liability of ship owner for assault and imprisonment of passenger by purser. See *Emerson v. The Niagara Navigation Co.*, 2 O. R. 528, p. 450.

Conveying travellers on Sunday. See *Regina v. Daggett*; *Regina v. Fortier*, 1 O. R. 537, p. 744.

For non-performance of charter party. See *McEwan v. McLeod*, 46 Q. B. 235; 9 A. R. 239, p. 102.

IV. MASTER.

Action for work and services.—Employment of master “for the season.”—Loss of vessel. See *Ellis v. The Midland R. W. Co.*, 7 A. R. 464, p. 448.

See *Merchants' Bank v. Graham*, 27 Chy. 524, p. 735.

VI. COLLISION.

On the 27th April, 1880, at port K, on lake Erie, where vessels go to load timber, staves, &c., and where the Erie Belle, the respondent's vessel, was in the habit of aniding and taking passengers, the M. C. Upper, the appellant's vessel, was moored at the west side of the dock, and had her anchor dropped some distance out in continuation of the direct line of the east end of the wharf, thus bringing her cable directly across the end of the wharf from east to west, and without buoying the same or taking some measure to inform incoming vessels where it was. The Erie Belle came into the wharf safely, and in backing out from the wharf she came in contact with the anchor of the M. C. Upper, making a large hole in her bottom. On a petition filed by the owner of the Erie Belle, in the maritime court of Ontario to recover damages done to his vessel by the schooner M. C. Upper, the judge who tried the case found, on the evidence, that both vessels were to blame, and held that each should pay one half of the damage sustained by the Erie Belle. On appeal by owner of the M. C. Upper and cross appeal by owner of the Erie Belle to the Supreme Court of Canada:—Held, per Ritchie, C. J., and Fournier and Taschereau, J.J., that as the Erie Belle, being managed with care and skill, went to the wharf in the usual way, and came out in the usual way, and as the M. C. Upper had wrongfully and negligently placed her anchor (as much a part of the vessel as her masts) where it ought not to have been, and without indicating, by a buoy or otherwise, its position to the Erie Belle, the owner of the Erie Belle was entitled to full compensation, and the M. C. Upper should pay the whole of the damage. Per Strong, Henry and Gwynne, J.J., that the M. C. Upper had a right to have her anchor where it was, and that it was not in the line by which the Erie Belle entered and by which she could have backed out; that the strain on the anchor chain,

when the crew of the *M. C. Upper* were hauling on it all the time the *Erie Belle* was at K., sufficiently indicated the position of the anchor, and therefore that the accident happened through no fault or negligence on the part of the *M. C. Upper*. The court being equally divided, the appeal and cross appeal were dismissed without costs. *McCallum v. Odette*, 7 S. C. R. 36.

VII. GENERAL AVERAGE.

Where a vessel was disabled by a gale near a lee shore, so that she could not work off, and after the anchors had dragged until she began to pound on the bottom, the master, with the view not of saving the cargo, but of enabling the crew to escape, headed her round to the shore, where she was stranded and abandoned by the crew, and the defendant, the owner of the cargo, afterwards got it out at his own expense:—Held, that the stranding was not voluntary, and that the cargo was not liable to general average. *Dancey v. Burns*, 31 C. P. 313.

VIII. ASSESSMENT OF SHIPS.

K. resided and did business in the city of Halifax, and was owner of ships which were not registered at the city of Halifax, and which had never visited the Port of Halifax. Under the authority of 37 Vict. c. 30, sec. 1, and 27 Vict. c. 81, secs. 340, 347, 361, Rev. Stat. N. S., the assessors of the city of Halifax valued the property of K., and included therein the value of said vessels:—Held, that vessels owned by a resident, but never registered at Halifax, and always sailing abroad, did not come within the meaning of the words "whether such ships or vessels be at home or abroad at the time of assessment," and therefore were not liable to be assessed for city taxes. *The City of Halifax v. Kenny*, 3 S. C. R. 497.

IX. MISCELLANEOUS CASES.

Seizure of share in ship. See *Trerice v. Burkett*, 1 O. R. 80, p. 655.

Warranty as to class of ship. See *LaRoche v. O'Hagan et al.*, 1 O. R. 300, p. 780.

See *Weldon v. Vaughan et al.*, 5 S. C. R. 35, p. 130.

SHOPS.

See *TAVERNS AND SHOPS*.

SHORT FORMS.

See *DEED*.

SIMILITER.

See *PLEADING*.

SLANDER.

See *DEFAMATION*.

SOCIETY.

See *CORPORATIONS*.

SOLICITOR.

See *ATTORNEY AND SOLICITOR*.

SPECIAL BAIL.

See *BAIL*.

SPECIAL CASE.

See *PARLIAMENTARY ELECTIONS*.

SPECIAL ENDORSEMENT.

See *PRACTICE*.

SPECIFIC PERFORMANCE.

I. CONTRACTS FOR THE SALE OF, OR RELATING TO LAND.

1. *Statute of Frauds*, 738.
2. *Where Contract is Conditional*, 740.
3. *Compensation or Abatement of the Purchase Money*, 740.
4. *Pleading and Practice*.
 - (a) *Parties*, 740.
 - (b) *Demurrer*, 741.
 - (c) *Costs*, 741.
5. *Enquiry as to Damages*, 741.
6. *Other Cases*, 742.

II. OF ACTS OF PARLIAMENT, 742.

III. OF AWARDS, 743.

IV. OF OTHER AGREEMENTS, 743.

I. CONTRACTS FOR THE SALE OF OR RELATING TO LAND.

1. *Statute of Frauds*.

Although the 4th section of the Statute of Frauds requires any agreement for the purchase or sale of land to be evidenced by a note or memorandum thereof to be signed by the party sought to be charged, yet where lands were sold by a trading corporation, under a power of sale contained in a mortgage, and the purchaser at such sale signed an agreement to purchase, and afterwards filed a bill seeking specific performance with compensation for the loss of crops which were advertised with the land, but actually belonged to third parties, and the defendants, (the corporation), answered the bill admitting the fact of their being mortgagees, and proceeded with sundry statements such as, "when the plaintiff bid for and was declared the purchaser of the lands * * the sum bid by the plaintiff

was a low price * * that the plaintiff was not in fact the real purchaser of the lands at the said sale * * that the company was not bound to put the plaintiff in possession, but never did any act to prevent her taking possession, and * * that possession was taken by the plaintiff," and the answer claimed no benefit from the statute, and did not deny having made the contract; neither did it raise any objection to the want of the corporate seal:—Held, that this sufficiently admitted the agreement to sell and no protection of the statute having been claimed, that the plaintiff was entitled to a decree, with compensation for the loss of the crops, with costs. *Cleaver v. The North of Scotland Canadian Mortgage Co.*, 27 Chy. 508.

The defendant in 1871 wrote to his son who had left home to work for himself, that if he would return he would give him 50 acres of his farm and a share of the cattle and sheep when the plaintiff got married, but if he stayed away he would sacrifice his own and his father's interests. Upon receipt of the letter the plaintiff returned and remained on the farm working it with his father, except at certain times when he went away to work for wages for himself. It was proved that the father had pointed out the 50 acres which he intended to give his son, and the son entered and erected a house thereon with his father's approval, and occupied it with his family, he having married in 1879:—Held, that the plaintiff was entitled to specific performance of this agreement. *Garson v. Garson*, 3 O. R., C. P. D. 439.

A., whose wife owned a certain freehold property on St. George's street, wrote to B., the owner of a certain leasehold property on King street, with reference to the said properties, as follows, "If you will assume my mortgage, and pay me in cash, \$3,700, I will assume your mortgage of \$5,000 on the leasehold, and B. replied, "Your offer of this date, for the exchange of my property on King street for your property on St. George street, I will accept on your terms:—Held, affirming the judgment of Ferguson, J., 2 O. R. 609, not a sufficient memorandum of the contract to satisfy the Statute of Frauds. Armour, J., doubting. Held, also, in an action for specific performance of the above contract by B., correspondence between the solicitors of the parties of date subsequent to the date of the above letters, as also the requisitions respecting title which passed between the solicitors, were inadmissible in evidence. Held, further, the fact that A.'s wife had signed a conveyance of the land in question to B., which conveyance had never been delivered, and did not, by recital or otherwise, set forth the contract relied on, could not assist B. in the action for specific performance. *McClung v. McCracken et ux.*, 3 O. R., Q. B. D. 596.

The decree of the Court of Chancery, 28 Chy. 207, affirmed on appeal with costs. In letters written by the solicitor of a purchaser of land sold at auction it was stated that the advertisement of sale had represented that twenty acres of the land purchased from the defendant had been cleared and fenced, whilst the fact was no fencing whatever remained on the premises, and by reason thereof claimed compensation, and in his answers thereto the defendant did not deny the fact of sale and purchase, but disputed the

right to compensation:—Held, a sufficient admission of the fact stated to take the case out of the Statute of Frauds, although no contract of sale had been signed by the vendor. *Stammers v. O'Donohoe*, 8 A. R. 161. Affirmed by the Supreme Court. See 20 C. L. J. 260.

See *Halloran v. Moon*, 28 Chy. 319, p. 743; *Carroll v. Williams*, 1 O. R. 150, p. 406.

2. Where Contract is Conditional.

See *Cameron v. Wellington, Grey and Bruce R. W. Co.*, 28 Chy. 327, p. 674.

3. Compensation or Abatement of the Purchase Money.

Although a vendor is allowed great latitude in the statements or exaggerations he may make as to the general qualities and capabilities of land he is about to offer for sale, still he will not be permitted to make direct misstatements and misrepresentations as to matters of fact which would naturally have the effect of inducing parties resident at a distance to bid for the property. Therefore, where an advertisement of property about to be sold described it as being "a farm of 81½ acres, 20 acres cleared and fenced," on the faith of which the plaintiff purchased, when in fact there was not any clearing or fencing made upon the premises, the court (Blake, V.C.) in pronouncing a decree for specific performance at the instance of the purchaser, directed a reference to the master to make an allowance in respect of the matters misrepresented, and ordered the vendor to pay the costs of the suit. *Stammers v. O'Donohoe*, 28 Chy. 207; see S. C. in appeal, 8 A. R. 161, *supra*.

An owner of real estate who alone enters into an agreement to sell will be required to procure a bar of his wife's dower or abate the purchase money in the event of her refusal; *Van Norman v. Beaupre*, 5 Chy. 599. *Loughead v. Stubbs*, 27 Chy. 387.

See *Cleaver v. The North of Scotland Canadian Mortgage Co.*, 27 Chy. 508, p. 739; *Carroll v. Williams*, 1 O. R. 150, p. 406.

4. Pleading and Practice.

(a) Parties.

When his wife joins with the owner of real estate in the contract of sale, and the purchaser institutes proceedings to compel specific performance thereof, the wife must be joined as a party defendant; and the fact that the bill alleges that her only interest is that of an inchoate dower forms no ground for dispensing with her being so joined. *Loughead v. Stubbs*, 27 Chy. 387.

Where the owners of the property in an action for the specific performance of a sale of land, were married women, and their husbands were joined as co-plaintiffs, and the defendant demurred *ore tenus*, on ground of misjoinder of parties, leave was given to amend by making the husbands defendants, or by adding next friends for the married women as co-plaintiffs. *Young et al. v. Robertson*, 2 O. R., Chy. D. 434.

See *Cameron v. Wellington, Grey and Bruce R. W. Co., et al.* 27 Chy. 95, p. 622; *In re Treleven and Horner*, 28 Chy. 624, p. 776; *Carroll v. Williams*, 1 O. R. 150, p. 406; *Roberts v. Hall*, 1 O. R. 388, p. 743.

(b) *Demurrer.*

Where a demurrer is raised to a statement of claim for specific performance on the ground of no sufficient agreement, it is enough if in any aspect of the case, the plaintiff may be entitled to some relief. In this case it was held, on the statement of claim set out in the report, that a concluded contract was shewn, and that defendant was liable. Misjoinder of parties is, since the Judicature Act, no longer a ground for demurrer. *Young et al. v. Robertson*, 2 O. R., Chy. D. 434.

(c) *Costs.*

Whatever may be the rule in England, this court has maintained jurisdiction to make a defendant pay costs in a suit for specific performance, though the bill be dismissed, if the circumstances be such as to warrant doing this. Hence, in such a suit, brought by the purchasers of certain lands, against the vendors and a subsequent purchaser. Where the judge of first instance dismissed the action without costs, but gave the subsequent purchaser his costs against his co-defendants, although no issue was raised between the defendants:—Held, that he had jurisdiction to make the order, in his discretion, and having exercised such discretion, this court would not interfere. *McMahon v. Barnes*, Order Book No. 9, fol. 730, (not reported,) followed. *Church v. Fuller et al.*, 3 O. R., Chy. D. 417.

In a suit for specific performance, the defendant set up that the reason he had refused to complete the agreement was, that he had been induced to enter into it by certain misrepresentations of the plaintiff, but which he entirely failed in proving. Although the master reported that a good title was first shewn in his office, the decree on further directions ordered the costs to be paid by the defendant, notwithstanding that the bill contained certain statements which, it was alleged, were not true, and had not been proved, the court being of opinion that such statements had not any material bearing upon the case, and that a suit would have been necessary without reference to the question of title. *Platt v. Blizard*, 29 Chy. 46.

See *Stammers v. O'Donohoe*, 28 Chy. 207, p. 740; *Rutherford v. Sing*, 29 Chy. 511, p. 742.

5. *Enquiry as to Damages.*

On a bill filed to rescind a contract for the sale of land, the defendants asked by way of cross relief to have the same specifically performed. On a re-hearing the divisional court refused specific performance or rescission, but, having regard to the finding of the judge at the trial, that no actual fraud had been proved against the defendant the purchaser, though it appeared that to a certain extent he had overreached the plaintiff, an old woman, when making the contract, they ordered a reference, under

Casey v. Hanlon, 22 Chy. 225, to ascertain the amount, if any, of the defendant's damages. The master at Orangeville found defendant entitled to \$11.05, his costs of investigating the title, but refused to allow him \$1000, which was the difference between the contract price and the value of the land. On appeal, *Boyd, C.*, confirmed the master's report. *Gough v. Bench*, 9 P. R. 431.

6. *Other Cases.*

In a suit at the instance of a vendor of land for the specific performance of an agreement to sell, the defence raised was, that the land was agreed to be conveyed free from incumbrances, but the same was subject to the dower of one M. and to a mortgage, and therefore that a good title could not be shewn. It was satisfactorily shewn that the dower had been sufficiently barred, and the report of the master stated that the price agreed to be paid for the land was \$3500; that \$1800 was due on the mortgage, and that the purchaser had paid only \$100 on account of his purchase, "and that the non-completion of the contract (was) attributable to the desire of the purchaser to recede from the contract." The defendant, down to the bringing of the decree into the master's office, had not demanded any abstract or made any objection to the title: the court, on further directions, made a decree ordering defendant to specifically carry out the agreement, and pay to the plaintiff the general costs of the cause. *Graham et al. v. Stephens*, 27 Chy. 434.

In a suit for specific performance it was shewn that the plaintiff had agreed to convey to the defendants certain lands in consideration of his being paid one-third of the sum for which defendants should be enabled to sell the same. This agreement was subsequently cancelled on the defendants undertaking to pay plaintiff \$2000, one-half by a note, the other half by the conveyance of certain town lots at an ascertained valuation; and this second or substituted agreement the plaintiff sought to enforce. The defendants set up that in consequence of their ascertaining that plaintiff had not a title to the land conveyed to them, a fresh agreement was entered into to the effect that the defendants should be at liberty to sell the land, and pay to plaintiff one-third of the net proceeds, and which they asserted they had done. At the hearing the court (*Spragge, C.*), being satisfied that the defendants' account of the transaction was correct, refused the relief claimed, but offered the plaintiff a reconveyance on payment of costs, which the defendants assented to, or a decree upon the footing of the third or last mentioned agreement upon payment of costs: On rehearing, this decree was affirmed with costs. *Rutherford v. Sing*, 29 Chy. 511.

A writ of arrest will not be granted against the purchaser in a suit for specific performance, unless it be shewn by affidavit that the vendor's lien is insufficient. *Nelson v. Dufoe*, 8 P. R. 332.—Proudfoot.

II. OF ACTS OF PARLIAMENT.

See *Attorney General v. International Bridge Co.*, 6 A. R. 537, p. 343.

III. OF AWARDS.

Held, affirming the decree of Proudfoot, V.C., that the plaintiff was entitled to specific performance of an award giving him damages for his lands taken by the defendants; that the sum awarded was not so excessive as to shew any fraudulent or improper conduct on the part of the arbitrators, and—Quære, whether if shewn it would be a defence in such a proceeding. *Norvall v. The Canada Southern R. W. Co.*, 5 A. R. 13.

IV. OF OTHER AGREEMENTS.

The court will enforce a verbal agreement, although it is to do an act which is not to be performed within a year from the time of making the agreement where the consideration therefor has been executed. *Halleran v. Moon*, 28 Chy. 319.

When a father enters into a contract whereby he parts with the custody and control of his child with the bona fide intention of advancing the welfare of the child there is nothing in such a contract illegal or contrary to public policy, and although where such a contract is executory on both sides the court cannot decree specific performance by reason of the want of mutuality, yet where the contract has been faithfully performed, so far as the father and child are concerned, so that their status has become altered, the court will if possible enforce in specie the performance of the contract by the other party to it. *Roberts v. Hall*, 1 O. R., Chy. D. 388.

When the parents of the plaintiff agreed with H. and his wife to give up to them their daughter, the plaintiff, then six years old, to bring up as their own, and make her sole heiress of their property at their death, and when it appeared that the agreement was bona fide intended by the father for the ultimate benefit of the plaintiff, and that the plaintiff had remained with H. and his wife for twenty years, rendering them efficient service, and it appeared H. intended her to have his property, and regarded the agreement as binding, so that he considered it unnecessary to make a will :—Held (reversing the judgment of Ferguson, J.), that the agreement could be enforced against H.'s representative, and that it must be decreed accordingly :—Held, also (affirming the judgment of Ferguson, J.), that inasmuch as if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered they would be trustees for the proceeds for her, the plaintiff might maintain the suit in her own name. *Id.*

Held, that the votes of registered bondholders of a railway having been rejected, the arrangement made in this case, though confirmed by two-thirds of the actual shareholders present, or represented, was nevertheless not properly confirmed within the meaning of the statute, and an action to compel specific performance of the agreement was dismissed. *Hendrie v. The Grand Trunk R. W. of Canada—The Grand Trunk R. W. Co. of Canada v. The Toronto Grey, and Bruce R. W.*, 2 O. R., Chy. D. 441. This case has been carried to appeal.

See *Cameron v. Wellington, Grey and Bruce R. W. Co. et al.*, 28 Chy. 327, p. 674; *Calvert v. Burnham*, 6 A. R. 620, p. 722.

SPEEDING CAUSE.

See PRACTICE.

SPIRITUOUS LIQUORS.

See CANADA TEMPERANCE ACT, 1878—TAVERNS AND SHOPS.

SQUARE.

See DEDICATION.

STAKEHOLDER.

See *Hutton v. Federal Bank*, 9 P. R. 568, p. 69.

STAMPS.

I. ON BILLS OR NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

II. LAW STAMPS—See LAW STAMPS.

STATEMENT OF CLAIM.

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STATEMENT OF DEFENCE.

See PLEADING.

STATUTE LABOUR.

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STATUTES.

I. CONSTRUCTION, 744.

II. PROSPECTIVE AND RETROSPECTIVE, 745.

III. REPEAL, 745.

IV. IMPERIAL ENACTMENTS—See CONSTITUTIONAL LAW.

V. BRITISH NORTH AMERICA ACT, 1867—See CONSTITUTIONAL LAW.

VI. STATUTE OF FRAUDS—See FRAUDS (STATUTE OF.)

VII. OF LIMITATIONS—See LIMITATION OF ACTIONS AND SUITS.

VIII. OF MORTMAIN—See WILL.

IX. PARTICULAR WORDS—See WORDS AND TERMS.

I. CONSTRUCTION.

In penal statutes questions of doubt are to be construed favourably to the accused. *North Ontario, Election (Ont.)—McCaskill v. Paxton*, 1 H. E. C. 304.

Held, following *Eastern Counties, &c., R. W. Co. v. Marriage*, 9 H. L. Ca. 32; *Lang v. Kerr*, L. R. 3 App. Cas. 529; and *Van Norman v. Grant*, 27 Chy. 498, that both ss. 10 and 11 of R. S. O. c. 49, are to be governed by the heading immediately preceding sec. 10; so that where the interest sought to be reached by the creditor has not been concealed by a fraudulent conveyance, the Judge has no authority to give summary relief under sec. 11. *Wood v. Hurl*, 28 Chy. 146.

Remarks as to embracing in one Act several subjects which are not expressed in the title; and as to the effect of the title and preamble of a statute as guides to the construction. *Regina v. Washington*, 46 Q. B. 221.

II. PROSPECTIVE AND RETROSPECTIVE.

Prospective. See *Martindale v. Clarkson*, 6 A. R. 1, p. 228.

Retrospective. See *Cooper v. Kirkpatrick*, 8 P. R. 248, p. 56; *Ferguson v. English and Scottish Investment Co.*, 8 P. R. 404, p. 475; *Sanders v. Malsburg*, 1 O. R. 178, p. 776.

III. REPEAL.

Sec. 217 of 29-30 Vict. c. 51 has not been repealed though marked effete in the schedule prefixed to and not re-enacted in 36 Vict. c. 48 O. *Scottish American Investment Co. v. Corporation of Elora*, 6 A. R. 625.

Effect of repeal of Stamp Act. See *Caughill v. Clarke*, 9 P. R. 471, p. 74.

See *Brock v. The Corporation of the City of Toronto*, 45 Q. B. 53, p. 490.

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STATUTORY CONDITIONS.

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See PRACTICE.

STOCK AND STOCKHOLDERS.

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SUMMARY PROCEEDINGS.

I. BEFORE MAGISTRATES.—See JUSTICES OF THE PEACE.

II. SUMMARY TRIAL BEFORE COUNTY JUDGE.
—See CRIMINAL LAW.

SUNDAY.

The Imp. Act 21 Geo. III. c. 49, prohibiting amusements and entertainments on the Lord's Day, is in force in Ontario, and an application to quash a conviction thereunder for keeping a disorderly house known as the "Royal Opera House," opened and used for public entertainment and amusement on the Lord's Day, was therefore refused. *Regina v. Barnes*, 45 Q. B. 276.

The defendants, owner and captain respectively of a steamboat, advertised that they would carry excursionists on Sundays. A number of passengers left Buffalo, in the State of New York, on a Sunday morning, and proceeded by rail to Niagara, whence they were carried by the defendants' steamboat to Toronto and back the same day. The defendants having been convicted therefor for an offence under R. S. O. c. 189:—Held, that the passengers were "travellers" within the meaning of the exception in sec. 1 of the Act: that there is no distinction in such a case between travellers for pleasure and for business; and that the convictions were therefore bad. *Regina v. Daggett*, *Regina v. Fortier*, 1 O. R., Q. B. D. 537.

Held, that R. S. O. c. 189, which forbids the profanation of the Lord's Day by persons carrying on their ordinary business, does not apply to persons in the public service of Her Majesty, and therefore a conviction of a government lock-tender on the Welland canal, for locking a vessel through the canal on Sunday, in obedience to the orders of his superior, was quashed. *Regina v. Berriman*, 2 O. R., Q. B. D. 282.

In computing time. See *McLean v. Pinkerton*, 7 A. R. 490, p. 759.

SUPPLEMENTAL ANSWER.

See PLEADING.

Support, per Lalor.
SUPREME COURT.

I. APPEALS TO.

1. When Appeal will lie, 747.
2. Leave to Appeal, 749.
3. Bond and Security, 749.
4. Setting down Cause, 749.
5. Cross Appeals, 750.
6. Amendment of Pleadings, 750.

7. *Right to take grounds of Appeal not taken below*—See COURT OF APPEAL, I. 6, p. 176.
8. *Costs*, 751.
9. *Miscellaneous Cases Relating to Appeal*—See APPEAL.

I. APPEALS TO.

1. *When Appeal will Lie.*

Per Strong and Taschereau, JJ., that an appeal does not lie from the Court of Review (P.Q.) to the Supreme Court of Canada, (Henry, J. contra). *Macdonald v. Abbott*, 3 S. C. R. 278.

Held that the order appealed from in this case being a decision on an application by a third party to the court was appealable under the 11th sec. of 38 Vict. c. 11 (Fournier, J., dissenting and Taschereau, J., doubting) *Wilkins v. Geddes*, 3 S. C. R. 203.

Held, that the appeal in cases of mandamus, under sec. 23 of the Supreme and Exchequer Court Act, is restricted by the application of sec. 11 to decisions of "the highest court of final resort" in the province; and that an appeal will not lie from any court in the province of Quebec but the Court of Queen's Bench. (Fournier and Henry, JJ., dissenting). *Danjou v. Marquis*, 3 S. C. R. 251.

Held that an appeal from the Supreme Court of Nova Scotia, ordering rank and precedence at the bar to one R. would lie to the Supreme Court of Canada (Fournier, J., dissenting). *Lenoir et al. v. Ritchie*, 3 S. C. R. 575.

Held, on a motion to quash, that an appeal will not lie to the Supreme Court of Canada in cases in which the court of original jurisdiction is not a superior court, and that the Court of Wills and Probate for the county of Lunenburg, Nova Scotia is not a superior court within the meaning of the 17th sec. of the Supreme and Exchequer Court Act. *Beamish et al. v. Kaulback*, 3 S. C. R. 704.

In an action instituted in the Superior Court of the Province of Quebec by the appellant against M. A. C. and nine other defendants, the respondents, three of the defendants, severally demurred to the appellant's action, except as regarded two lots of land, in which they acknowledged the appellant had an undivided share. The Superior Court sustained the demurrer, and, on appeal, the Court of Queen's Bench for Lower Canada (appeal side) affirmed the judgment. The appellant thereupon appealed to the Supreme Court, and respondents moved to quash the appeal on the ground that the Supreme Court had no jurisdiction:—Held, that as the judgment of the Court of Queen's Bench (the highest court of last resort having jurisdiction in the Province) finally determined and put an end to the appeal, which was a judicial proceeding within the meaning of sec. 9 of the Supreme Court Amendment Act of 1879, such judgment was one from which an appeal would lie to the Supreme Court of Canada; and though an appeal cannot be taken from a court of first instance directly to the Supreme Court until there is a final judgment, yet, whenever a Provincial Court of Appeal has jurisdiction, this court can entertain an appeal from its judgment

finally disposing of the appeal, the case being in other respects a proper subject of appeal. *Chevalier v. Cuvillier et al.*, 4 S. C. R. 605.

Held, where a disputed fact, involving nautical questions, is raised by an appeal from the judgment of the Maritime Court of Ontario, as in the case of a collision, the Supreme Court will not reverse the decree of the judge of the court below, merely upon a balance of testimony. "*The Pictou*"—*McCuaig v. Keith*, 4 S. C. R. 648.

The original petition in this case came before Mr. Justice McCord for trial, and was tried by him on the merits, subject to an objection to his jurisdiction. The learned judge having taken the case en délibéré, arrived at the conclusion that he had no jurisdiction, declared the objection to his jurisdiction well founded, and "in consequence the objection was maintained, and the petition of the petitioner was rejected and dismissed." This judgment was appealed from, and the now respondent, under sec. 48 of the Supreme Court Act, limited his appeal to the question of jurisdiction, and the Supreme Court held that Mr. Justice McCord had jurisdiction, and it was ordered that the record be transmitted to the proper officer of the lower court, to have the said cause proceeded with according to law. The record was accordingly sent to the prothonotary of the Superior Court at Montmagny. Mr. Justice McCord, after having offered the counsel of each of the parties a re-hearing of the case, proceeded to render his judgment on the merits and declared the election void. The respondent then appealed to the Supreme Court, and contended that Mr. Justice McCord had no jurisdiction to proceed with the case:—Held, that the Supreme Court on the first appeal could not, even if the appeal had not been limited to the question of jurisdiction, have given a decision on the merits, and that the order of this court remitting the record to the proper officer of the court below to be proceeded with according to law, gave jurisdiction to Mr. Justice McCord to proceed with the case on the merits, and to pronounce a judgment on such merits, which latter judgment was properly appealable under sec. 48 of the Supreme Court Act (Fournier and Henry, JJ., dissenting). *Bellechasse Election (Dom.)*—*Larue v. Deslauriers*, 5 S. C. R. 91.

L., appellant, sued R., the respondent, before the Superior Court at Arthabaska, in an action of damages (laid at \$10,000) for slander. The judgment of the Superior Court awarded to the appellant a sum of \$1,000 for special and vindictive damages. R. appealed to the Court of Queen's Bench (appeal side), and L., the present appellant, did not ask, by way of cross appeal, for an increase of damages, but contended that the judgment for \$1,000 should be confirmed. The Court of Queen's Bench partly concurred in the judgment of the Superior Court, but differed as to the amount, because L. had not proved special damages, and the amount awarded was reduced to \$500, and costs of appeal were given against the present appellant. L. thereupon appealed to the Supreme Court:—Held, Taschereau, J., dissenting, that L., the plaintiff, although respondent in the court below, and not seeking in that court by way of cross appeal an increase of damages beyond the \$1,000, was entitled to appeal, for in determining the amount of the matter in controversy between the parties, the

proper course was to look at the amount for which the declaration concluded, and not at the amount of the judgment. *Joyce v. Hart*, 1 S. C. R. 321, reviewed and approved. *Levi v. Reed*, 6 S. C. R. 482.

See *The Connecticut Mutual Life Ins. Co. of Hartford v. Moore*, 6 App. Cas. 644, p. 505.

2. Leave to Appeal.

The Chief Justice of the Supreme Court, under sec. 6. of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court of Canada, it being known that there were then only two judges on the bench in Manitoba, the plaintiff (Chief Justice), and Dubuc, J., from whose decree the appeal was brought. *Schultz v. Wood*, 6 S. C. R. 585.

See also *Neill v. Travellers' Ins. Co.*, 9 A. R. 54.

3. Bond and Security.

The delay being the act of the court, the time for filing the bond must count from the granting of leave to appeal, as no delay took place in applying for such leave. *McCrae v. White*, 9 P. R. 288.—Patterson.

The following certificate was filed with the printed case, as complying with Rule 6 of the Supreme Court Rules: "We, the undersigned, joint prothonotary for the Superior Court of Lower Canada, now the Province of Quebec, do hereby certify that the said defendant has deposited in our office, on the twentieth day of November last, the sum of five hundred dollars, as security in appeal in this case, before the Supreme Court, according to section (31) thirty-first of the Supreme Court Act, passed in the thirty-eighth year of Her Majesty, chapter second. Montreal, 17th January, 1878. Signed, Hubert, Honey & Gendron, P. S. C." Held, on motion to quash appeal, that the deposit of the sum of \$500, in the hands of the prothonotary of the court below, made by appellant, without a certificate that it was made to the satisfaction of the court appealed from, or any of its judges, was nugatory and ineffectual as security for the costs of the appeal. Per Taschereau, J., the case should be sent back to the court below in order that a proper certificate might be obtained. *Macdonald v. Abbott*, 3 S. C. R. 278.

See *The Citizens' Ins. Co. v. Parsons et al.*, 32 C. P. 492, p. 175.

4. Setting down Cause.

On a motion to quash the appeal on behalf of the respondent, on the ground that the appellant had not, within three days after the Registrar of the court had set down the matter of the petition for hearing, given notice in writing to the respondent, or his attorney or agent, of such setting down, nor applied to and obtained from the judge who tried the petition further time for giving such notice, as required by the 48th section of the Supreme and Exchequer Court Acts:—Held, that this provision in the statute was imperative; that the giving of such notice was a condition precedent to the exercise of any juris-

isdiction by the Supreme Court to hear the appeal; that the appellant having failed to comply with the statute, the court could not grant relief under Rules 56 or 69; and that, therefore, the appeal could not be then heard, but must be struck off the list of appeals, with costs of the motion. Subsequent to this judgment, the appellant applied to the judge who tried the petition, to extend the time for giving the notice, whereupon the said judge granted the application and made an order, "extending the time for giving the prescribed notice till the 10th day of December then next." The case was again set down for hearing at the February session following, being the nearest convenient time, and notice of such setting down was duly given within the time mentioned in the order. The respondent thereupon moved to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal, or failed to bring the same on for hearing at the next session, and that the judge who tried the petition had no power to extend the time for giving such notice after the three days from the first setting down of the case for hearing by the Registrar of this court:—Held, that the power of the judge who tried the petition to make an order extending the time for giving such notice is a general and exclusive power to be exercised according to sound discretion, and the judge having made such an order in this case, the appeal came properly before the court for hearing. (Taschereau, J., dissenting.) *North Ontario Election (Dom.)—Wheeler v. Gibbs*, 3 S. C. R. 374.

5. Cross Appeal.

An appellant in the Court of Queen's Bench, Quebec, who had partly succeeded, appealed to the Supreme Court on the ground that the judgment was yet excessive. At the same time the respondent appealed on the ground that the judgment of the superior court ought to have been affirmed. This second appeal was treated by the court as a cross-appeal under the Supreme Court rules, and the respondents on the second appeal, having succeeded in getting the judgment reversed on the second point and confirmed on the first point, were allowed costs of a cross-appeal. *Pilon et al. v. Brunet*, 5 S. C. R. 318.

6. Amendment of Pleadings.

D. McM. the respondent, sued S. W. B. Co., the appellants to recover damages alleged to have been sustained by reason of the obstruction of the river Miramichi by appellants' boom. The pleas were not guilty, and leave and license. On the trial the counsel proposed to add a plea, that the wrong complained of was occasioned by the extraordinary freshet. The counsel for the respondent objected on the ground that such plea might have been demurred to. The learned judge refused the application, because he intended to admit the evidence under the plea of not guilty. On appeal, the counsel for the appellant contended that the obstruction complained of was justified under the statute 17 Vict. c. 10, N. B., incorporating the Southwest Boom Company:—Held, that the appellants, not having put in a plea of justification under the statute, or applied to the Supreme Court of New Brunswick in banco for leave to amend their pleas, could

not rely on that ground before this court to reverse the decision of the court below. *The South-west Boom Co. v. McMillan*, 3 S. C. R. 700.

See also *Moore v. The Connecticut Mutual Ins. Co. of Hartford*, 6 S. C. R. 634.

8. Costs.

Held, that appellants, not having tendered with their plea costs accrued up to and inclusive of its production, should pay to the respondent the costs incurred in the court of first instance. *Etna Life Ins. Co. v. Brodie*, 5 S. C. R. 1.

On appeal to the Court of Appeal the judgments of the Court of Chancery in favour of the plaintiffs respectively, were affirmed with costs of appeal; and the defendants appealed to the Supreme Court. In the first case that court gave leave to the defendants (appellants) to amend their answer, saying nothing as to costs, and upon such amendment being made, declared that the award upon which the bill had been filed should be null and void, but said nothing about costs. In the second case the Supreme Court ordered a new trial to be had between the parties, without costs to either party. The plaintiffs having obtained orders of the Court of Chancery making the certificates of the Court of Appeal, of the judgments in appeal, orders of the Court of Chancery, issued executions thereon for the costs awarded in appeal:—Held, that the plaintiffs were not entitled to the costs of the appeal to the Court of Appeal, and the executions were set aside. *Norvall v. Canada Southern R. W. Co.*—*Cunningham v. Canada Southern R. W. Co.*, 9 P. R. 339.—Proudfoot. —Full court.

See *Pilon et al. v. Brunet*, 5 S. C. R. 318, p. 750.

SURETY.

See PRINCIPAL AND SURETY.

SURRENDER.

I. OF LEASES—See LANDLORD AND TENANT.

II. BY BAIL—See BAIL.

SURROGATE COURT.

See *Re O'Brien*, 3 O. R. 326, p. 267.

SURVEY.

See STATUTE OF LIMITATIONS.

In questions relating to boundaries and descriptions of lands, the well established rule is, that the work on the ground governs; and it is only where the site of a monument on the ground is incapable of ascertainment that a surveyor is authorized to apportion the quantities lying between two defined or known boundaries. There-

fore, where an original monument or post was planted as indicating that the north-west angle of a lot was situated at a distance of half a chain south therefrom, and another surveyor had actually planted a post at the spot so indicated, and subsequently two surveyors, in total disregard of the two posts so planted, both of which were easy of ascertainment, made a survey of the locality and placed the post at a different spot:—The court (*Spragge, C.*) disregarded the survey, and declared the north-west angle of the lot to be as indicated by the first mentioned monument. *Artley v. Curry*, 29 Chy. 243.

A surveyor in making a survey is under no statutory obligation to perform the duty, but undertakes it as a matter of contract, and is liable only for damages caused by want of reasonable skill, or by gross negligence. The defendant, a provincial land surveyor, who was employed by the plaintiffs to run certain lines for road allowances, proceeded upon a wrong principle in making the survey, and the plaintiffs sued him for damages which they had paid to persons encroached upon by opening the road according to his survey:—Held, reversing the judgment of the Common Pleas, (31 C. P. 77,) that the plaintiffs could not recover, as although the survey was made by the defendant on an erroneous principle, the evidence failed to prove that the lines as run by him were not correct. *Quære, per Patterson, J. A.*, whether the fact that the plaintiffs knew that the correctness of the survey was questioned before the opening the road, did not make them guilty of contributory negligence. Remarks upon the impropriety of receiving the opinions of surveyors as experts, as to the proper mode of making a survey under a statute. *Corporation of the Township of Stafford v. Bell*, 6 A. R. 273.

Expense incurred for surveys and other special work of that nature, made in order to qualify witnesses (surveyors) to give evidence are not taxable between party and party, the English Chancery Order 120 (1845) not being in force here. *McGannon v. Clarke*, 9 P. R. 555.—Boyd.

Compensation for improvements in consequence of unskilful survey. See *Plumb v. Steinhoff*, 2 O. R. 614, p. 332.

SURVEYOR.

See SURVEY.

TAVERNS AND SHOPS.

I. LEGISLATIVE AUTHORITY, 753.

II. SUPPLYING LIQUOR AFTER NOTICE, 753.

III. SELLING LIQUOR WITHOUT LICENSE.

1. *Who Liable*, 753.

2. *Convictions*, 753.

IV. MISCELLANEOUS CASES, 754.

V. CANADA TEMPERANCE ACT—See CANADA TEMPERANCE ACT, 1878.

VI. OPEN TAVERNS AND TREATING ON ELECTION DAYS—See PARLIAMENTARY ELECTIONS.

I. LEGISLATIVE AUTHORITY.

See *Regina v. Hodge, Regina v. Frawley*, 46 Q. B. 141, 153; 7 A. R. 246; 9 App. Cas. 117, p. 120.

II. SUPPLYING LIQUOR AFTER NOTICE.

The plaintiff, whose husband was in the habit of drinking intoxicating liquors to excess, gave notice to the defendant, a duly licensed inn-keeper, forbidding him to supply liquor to her husband; in consequence of which the defendant forbade his bar-keeper (his son) furnishing liquor to the husband, but the bar-keeper notwithstanding did serve the plaintiff's husband with liquor in the tavern kept by defendant. R. S. O. c. 181, s. 90, enacts that if the person so notified delivers or suffers to be delivered any such liquors to the person named in the notice, the person giving such notice may recover from him not less than \$20, nor more than \$200, to be assessed by the court or jury as damages:—Held, that defendant was liable. *Hugill v. Merrifield*, 12 C. P. 264, overruled. *Austin v. Davis*, 7 A. R. 478.

III. SELLING LIQUOR WITHOUT LICENSE.

1. Who liable.

A married woman was lessee of certain premises in which her husband sold liquor without a license, contrary to the provisions of R. S. O. c. 181:—Held, that she was liable to be fined under s. 83 of the Act, although the sale of liquor took place in her absence. *Regina v. Campbell*, 8 P. R. 55.—Hagarty.

The defendant, a servant of one Ward, the keeper of an unlicensed tavern, was convicted of selling liquor in her master's absence. Cameron, J., held the conviction good, the case being undistinguishable in principle from *Regina v. Williams*, 42 Q. B. 462, though he would otherwise have held the master alone responsible, under the Liquor License Act, R. S. O. c. 181, *Regina v. Howard*, 45 Q. B. 346.

2. Convictions.

Section 51 of the Liquor License Act, R. S. O. c. 181, which imposes the penalties, omits all reference to a third offence (which was provided for in the enactments of which it is a consolidation), though such an offence is referred to in sec. 73, which deals with the procedure, and in the forms of conviction given by the Act. A conviction for a third offence was therefore quashed, although the penalty imposed thereby might have been inflicted for a second offence. *Regina v. Frawley*, 45 Q. B. 227.

The defendant was licensed to sell "in and upon the premises known as the Palmer House." The Palmer House stood upon the front part of a deep lot owned by the defendant, the rear part of which had been for many years enclosed and used as a fair ground, immediately within which enclosure the defendant sold liquor, for which he was convicted:—Held, that as the fair ground, though part of the lot on which the hotel stood, was not used in connection with or for the en-

joyment of the hotel, it was not covered by the license, and the conviction was right. *Regina v. Palmer*, 46 Q. B. 262.

A certiorari will not lie to remove a conviction under "The Liquor License Act," R. S. O. c. 181, s. 48, which has been affirmed and amended on appeal to the sessions, for issuing a license contrary to the said Act, the procedure being regulated by 32-33 Vict. c. 31, s. 71, D, as amended by 33 Vict. c. 27, s. 2, D. *Regina v. Grainger*, 46 Q. B. 196.

The court refused to quash a conviction under the Liquor License Act affirmed on appeal, on the ground among others, that the general verdict of guilty was inconsistent with the answers of the jury to specific questions. *Regina v. Grainger*, 46 Q. B. 382.

Defendant was convicted for a third time of having sold liquor without a license, and was sentenced to three months' imprisonment with hard labour:—Held, following *Regina v. Frawley*, 46 Q. B. 153, that the magistrate had not power to impose hard labour, and the conviction was therefore invalid. *Regina v. Allbright*, 9 P. R. 25.—Osler. Overruled by *The Queen v. Hodge*, 9 App. Cas. 117, p. 120.

Seem, that in such a case a judge has no power to amend the conviction under R. S. O. c. 181, s. 77, as amended by 44 Vict. c. 27, by striking out the part imposing hard labour. *Ib.*

Defendant was convicted for selling liquor without a license on Dickinson's Island, in Lake St. Francis:—Held, on an application for a certiorari, 1. That the island was part of the county of Glengarry, and therefore within the jurisdiction of the police magistrate. 2. That the Liquor License Act applies to Indian land under lease from the crown to a private individual. 3. That only the holder of a license can be prosecuted under sec. 43 of the above Act, for selling liquor on prohibited days. *Regina v. Duquette*, 9 P. R. 29.—Osler.

IV. MISCELLANEOUS CASES.

The defendant and his brother were carrying on business as Booth Bros., and had a license in the name of the firm to sell intoxicating liquors. Before the nomination of members of the Parkdale council the defendant, with the consent of the license commissioners, transferred his interest in the license to his brother, in order to qualify as a councillor, but the business continued as before:—Held, affirming the decision of the master in chambers, that a license cannot lawfully be transferred except in the cases mentioned in R. S. O. c. 181, s. 28, none of which had occurred here: that the consent of the commissioners did not validate the transfer, and therefore that the defendant, who retained his interest in the license, was not qualified to be a councillor. Per Armour, J. The Act disqualifying a licensee should be construed strictly, and should not be extended to the partner of a person lawfully holding a license in his own name. *Regina ex rel. Brine v. Booth*, 3 O. R., Q. B. D. 144; 9 P. R. 452. See also, *Regina ex rel. Clancy v. Conway*, 46 Q. B. 85, p. 480.

See *Roberts v. Climie—Murphy v. Climie*, 46 Q. B. 264, p. 205.

TAXATION OF COSTS.

See COSTS.

TAXES.

I. MUNICIPAL—See ASSESSMENT AND TAXES.

II. ON SALE OF LAND—See SALE OF LAND—
See SALE OF LAND BY ORDER OF THE
COURT.

TELEGRAMS.

Production of—See *South Oxford Election*
(Ont.)—*Hopkins v. Oliver*, 1 H. E. C. 243, p.
570.

TEMPERANCE ACT.

See CANADA TEMPERANCE ACT, 1878.

TENANT.

See ESTATE.

TENDER.

OF DEED—See SALE OF LAND BY ORDER OF THE
COURT.

TERMS.

See WORDS AND TERMS.

TERM'S NOTICE.

See PRACTICE.

TIMBER.

I. SALE OF, 755.

II. DAMAGES, 758.

III. CROWN TIMBER—See CROWN LANDS.

IV. FLOATING TIMBER—See WATER AND
WATER COURSES.

V. REPLEVIN—See REPLEVIN.

I. SALE OF.

The first of three mortgagees having filed a bill for sale, the other two proved their claims in the suit. No one redeemed by the day appointed, but a final order for sale was not taken out, because one V., who had purchased the equity of

redemption, was negotiating with S. the third mortgagee. During these negotiations V. cut and sold a large quantity of the timber on the land to G., whereupon S. filed a bill praying payment by G. of the price of the timber, which had not yet been paid over:—Held, affirming the Master's ruling, that the first mortgagee was entitled to it. *Scott v. Vosburg*, 8 P. R. 336—Proudfoot.

C., after having examined a lot, entered into an agreement with W., the owner, whereby the latter sold all the pine timber standing on the lot to C., "such as will make good merchantable waney edged timber, suitable for his purpose, at the rate of \$13 per hundred cubic feet," and C. paid to W. \$1,000, "the balance to be paid for before the timber is removed from the lot." C. cut \$651.17 worth of first-class timber, suitable for the Quebec market which was all of that class to be found on the lot, and sued W. to recover back the balance of the \$1,000, namely, \$348.83:—Held, that the true construction of the contract was that W. sold and granted to C. permission to enter upon his lot, and cut all the "good merchantable timber there growing, suitable for his purpose," and not merely "first-class timber," that there was more than sufficient "good merchantable timber" still remaining on the lot to cover the balance of the \$1,000, and that there was no evidence to shew that the contract had been rescinded. Per Taschereau and Gwynne, JJ., that the payment of the \$1,000 was an absolute payment, the plaintiff believing and representing to defendant that there was sufficient timber to cover that amount, if not more, on the faith of which representation defendant entered into the contract, which he otherwise would not have done, and that if the plaintiff made an error, he, and not the defendant, must suffer the consequences of this error. *Clarke v. White*, 3 S. C. R. 309; 28 C. P. 293.

The respondents, owners of timber lands in New Brunswick, granted C. & S. a license to cut lumber on twenty-five square miles. By the license it was agreed inter alia: "Said stumpage to be paid in the following manner: Said company shall first deduct from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by them as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th April next, be secured by good endorsed notes, or other sufficient security, to be approved of by the said company, and payable on the 15th July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid. And said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise, shall be fully paid, and any and all damages for non-performance of this agreement, or stipulations herein expressed, shall be liquidated and paid. And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then in such case, said company shall have full power

and authority to take all or any part of said lumber wherever or however situated, and to absolutely sell and dispose of the same either at private or public sale, for cash; and after deducting reasonable expenses, commissions, and all sums which may then be due or may become due from any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due, either as stumpage or damages." For securing the stumpage payable to respondents under this license C. & S. gave to the respondents a draft upon J. & Co., which was accepted by J. & Co., and approved of by the respondents, but which was not paid at maturity. After giving the draft C. & S. sold the lumber to J. & Co., who knew the lumber was cut on the plaintiff's land under the said agreement. J. & Co. failed, and appellant, their assignee took possession of the lumber and sold it:—Held, per Strong, Taschereau and Gwynne, JJ. (affirming the judgment of the court below), Ritchie, C. J., and Fournier and Henry, JJ., dissenting, that upon the case as submitted, and by mere force of the terms of the agreement, the absolute property in the lumber in question did not pass to C. & S. immediately upon the receipt by the company of the accepted draft of C. & S. on J. & Co., and that appellant was liable for the actual payment of the stumpage. *McLeod v. The New Brunswick R. W. Co.*, 5 S. C. R. 281.

By agreement in writing, dated 15th October, 1873, A. agreed to sell, and B. and C. agreed to purchase, all the merchantable white and red pine timber, suitable for their purposes, standing, lying, or being on certain premises owned by A., for the price or sum of \$600, payable, \$400 on date of agreement, and the balance in one year, with a provision that the timber should be cut and removed off the lands, on or before the 15th of October, 1881. It was further provided that B. and C. their agents, representatives, or assigns, should have the right to enter upon the premises at all times during the period for which the agreement was to continue in force, for the purpose of cutting and removing said timber; and that if C. and B. should remove the whole of the timber off the land before the expiration of the year, they would pay the whole of the purchase money immediately after removing the said timber;—Held (Proudford, V. C., dissenting), that this was an agreement for the sale of an interest in land; that *prima facie* the vendor was entitled to a lien for unpaid purchase money, and that the circumstance that the timber was purchased by B. and C., for the purpose of being cut down and used at their mill as soon as possible, did not deprive the vendor of the right to the lien:—Held, also, that the last proviso in the agreement, as to immediate payment of the purchase money in case of removal of all the timber before the arrival of the time for payment of the \$200, did not operate to destroy the vendor's right to the lien. B. and C. did not pay the \$200, and after the expiration of a year from the date of the agreement assigned it to the defendants, who had no actual notice that the \$200 remained unpaid, but the agreement was registered against the lands:—Held, that the vendor was entitled to an injunction to prevent cutting and removing by the defendants until the \$200 was

paid. *Marshall v. Green*, L. R., 1 C. P. D. 35, commented upon and distinguished. *Summers v. Cook*, 28 Chy. 179.

Under an agreement, dated 2nd October, 1880, the defendant sold to B. all the pine timber growing on certain lands, to be removed during the years 1880 and 1881. The timber was all cut into logs before the end of 1881, but a portion was not then removed:—Held, that this was a sale of goods and chattels, and not an interest in land; and the timber so cut having become the plaintiff's property, he had the right to remove it after the expiration of the time mentioned; though, *Semble*, the defendant might have a right of action for not removing it within the time. The defendant having refused to permit such removal, the plaintiff brought replevin, and was held entitled to succeed. *McGregor v. McNeil*, 32 C. P. 538.

Guarantee by bank manager as to culling timber. See *Dobell et al. v. Ontario Bank et al.*, 3 O. R. 299; 9 A. R. 484, p. 313.

On a sale of "timber limits" held under licenses in pursuance of the C. S. C. cap. 23, a clause of simple warranty (*garantie de tous troubles généralement quelconques*) does not operate to protect the purchaser against eviction by a person claiming to be entitled under a prior license to a portion of the limits sold. *Ducondu v. Dupuy*, 9 App. Cas. 150. Reversing S. C. 6 S. C. R. 425.

See *Reid v. Smith*, 2 O. R. 69, p. 581.

II. DAMAGES.

The plaintiff contracted to deliver timber to the defendant at St. Ignace, to be transported by him to Quebec for sale there. There was no market nearer to the place of delivery than Quebec. The plaintiff made default and in action for the price the defendant counter-claimed for damages for non-delivery of the timber:—Held, Cameron, J., dissenting, reversing the judgment of Burton, J. A., that the measure of damages was the value of the timber at Quebec, less the cost of transportation thereto from the point of delivery. Per Burton, J. A., and Cameron, J.—Loss of profits could not be recovered, and as the contract price for such timber had not varied, and there was no evidence of any contract by defendant to re-sell, which could be taken into consideration, or of any purchase by him to supply its place, there was no right to more than nominal damages. *Hendrie v. Neelon*, 3 O. R., Q. B. D. 603. This case is in appeal.

The plaintiffs and defendant entered into an agreement in the following terms: "I, the undersigned, agree to deliver S. S. Mutton & Co., 40 M. ft. blk. ash, with mill culls out f.o.b. vessel on Cornwall canal, at \$10 per M. feet, Also, 10 M. ft. soft elm at \$10 per M. feet f.o.b. vessel on Cornwall canal, to be delivered in the month of June, 1881, the lumber now on stick and part seasoned," and the plaintiffs signed a corresponding memorandum, agreeing to accept such lumber at the time specified:—Held, that the words "with mill culls out," applied to the ash only, not to the elm:—Held, also, that the plaintiff, not having had a vessel ready to receive the lumber in June, could not recover. Per

Osler, J., time was of the essence of the contract, and the defendant was not bound to deliver the lumber in September. *Mutton v. Dey*, 7 A. R. 455.

TIME.

- I. NOTICE OF CALLS ON STOCK—See CORPORATIONS.
- II. TIME FOR APPEALING—See COURT OF APPEAL—PRACTICE.
- III. TIME FOR DECLARING OR PLEADING—See PLEADING.

The plaintiff and others, councillors of the town of Petrolia, attended a meeting of the council on the 5th April. They were absent at the next meeting called for and held on the 31st May and thenceforward, without authorization, till the 7th of July, when, at a meeting of the council, a resolution declaring their seats vacant, and ordering a new election was put, and an amendment to refer the matter to the town solicitor was lost: whereupon the dissentients left the room, in consequence of which there was no quorum, when the original motion was put and carried:—Held, that the three months should be counted from the 31st May, being the first meeting that the plaintiffs had not attended; and that the resolution was therefore void, as well as on the ground that there was no quorum present when it was passed. *Mearns v. The Corporation of the Town of Petrolia*, 28 Chy. 98.

In computing the time within which an action must be brought under the provisions of the Division Courts Act, R. S. O. c. 47. s. 231, the day on which the fact was committed must be excluded. See *Hanns v. Johnston*, 3 O. R. 100, p. 4.

Time of filing bond on appeal to Supreme Court. See *McCrae v. White*, 9 P. R. 288, p. 749.

An allegation in a conviction that the offence was committed between the 30th June and the 31st July, was—Held a sufficiently certain statement of the time. See *Regina v. Wallace*, 4 O. R. 127, p. 100.

A chattel mortgage was duly executed on the 12th of July, and filed on the 18th, the 17th having been Sunday:—Held, affirming the judgment of the County Court, that such registration was too late, the Act R. S. O. c. 119, requiring the same to be effected within five days from the execution of the instrument; that Sunday counted as one of such five days, and that Rule 457, O. J. Act did not apply. *McLean v. Pinkerton*, 7 A. R. 490.

TITLE.

- I. ON SALE OF LAND—See SALE OF LAND—SALE OF LAND BY ORDER OF THE COURT—SPECIFIC PERFORMANCE—VENDORS AND PURCHASERS' ACT.
- II. COVENANTS FOR—See COVENANTS FOR TITLE.

III. CLOUD ON—See SALE OF LAND.

IV. IMPROVEMENTS UNDER MISTAKE OF TITLE—See IMPROVEMENTS ON LAND.

V. BY POSSESSION—See LIMITATION OF ACTIONS AND SUITS.

VI. QUIETING TITLES—See QUIETING TITLES.

VII. SLANDER OF—See DEFAMATION.

VIII. TENANT'S POWER TO DISPUTE LANDLORD'S TITLE—See LANDLORD AND TENANT.

IX. REQUISITE TO MAINTAIN EJECTMENT—See EJECTMENT.

X. PROOF OF IN TRESPASS—See TRESPASS.

XI. JURISDICTION OF DIVISION COURTS WHEN TITLE TO LAND IS IN QUESTION—See DIVISION COURTS.

XII. OUSTING JURISDICTION BY CLAIM OF TITLE—See JUSTICES OF THE PEACE.

TOLLS.

See INTERNATIONAL BRIDGE COMPANY—WAY.

TORONTO (CITY OF).

Assessment for sewers. See *In re Brock v. The Corporation of the City of Toronto*, 45 Q. B. 53, p. 490.

TORT.

Held, under R. S. O. c. 125, that in an action for a tort committed by a wife during coverture the husband is not a proper party but the wife must be sued alone. *Amer v. Rogers et ux.*, 31 C. P. 195.

In torts the principle of agency does not apply; each wrong doer is a principal. See *The Ontario Industrial Loan and Investment Co. v. Lindsey et al.*, 4 O. R. 473.

TRADE.

- I. USAGE OF—See CUSTOM AND USAGE.
- II. RESTRAINING TRADES—See INJUNCTION.
- III. INFRINGEMENT OF TRADE MARKS—See INJUNCTION.
- IV. TRADE FIXTURES—See FIXTURES.

TRAMWAY.

See *The Corporation of the County of York v. The Toronto Gravel Road and Concrete Co.*, 3 O. R. 584, p. 129.

TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS.

TREATING.

See PARLIAMENTARY ELECTIONS.

TREES.

See TIMBER—WAY.

TRESPASS.

I. TO REALTY.

1. *By and Against Whom*, 761.
2. *Title and Possession*, 761.
3. *Several Trespasses*, 762.
4. *Damages*, 762.
5. *Injunction to restrain Trespass*, 762.
6. *Effect of Judgment in Trespass*, 763.
7. *Ousting Jurisdiction by Claim of Title*
See JUSTICES OF THE PEACE.

II. FOR MALICIOUS PROSECUTION, 763.

III. FALSE IMPRISONMENT, 763.

IV. FOR WRONGFUL DISTRESS—See DISTRESS.

I. TO REALTY.

1. *By and Against Whom*.

Held, Armour, J., dissenting, that the Crown timber licenses claimed by the plaintiff as licensee of the Ontario Government were subject to the right of the Canada Central Railway Company, acquired before confederation, to construct the road across the Crown lands over which the licenses in question extended, and that the defendants assignees of the railway company were therefore not liable for trespass for entering upon and cutting timber on the said limits in prosecution of the work of building the said railway. *Foran v. McIntyre et al.*, 45 Q. B. 288.

See *McLellan v. McKinnon*, 1 O. R. 219, pp. 331, 404.

2. *Title and Possession*.

On the 18th November, 1878, one Q. acting as agent for St. G., under a power of attorney which empowered him only to protect and lease St. G.'s lands, but not to sell, agreed with the plaintiff to sell him a wild lot, the purchase money to be paid by ten yearly instalments, and time to be of the essence of the agreement. The plaintiff paid only one instalment, which Q. said he forwarded to St. G., who ratified the agreement. Shortly after the agreement the plaintiff, with Q.'s permission, went on the lot and cut and removed some timber therefrom, and some two or three days afterwards went back and worked half a day underbrushing, but did no further clearing, except to cut timber for firewood. The defendants C. & S., under a mistake as to the plaintiff's boundary, trespassed on the land by cutting timber thereon, but on the boundaries being settled they offered plaintiff compensation, though C. said his offer was for the plaintiff's

interest in the land. The plaintiff was in default with St. G. when the action was brought, but not when the trespasses were committed.—Held, that there was sufficient evidence of plaintiff's title as against St. G., for the evidence shewed a partly performed agreement which could have been enforced; and even if the proof of St. G.'s title was defective the admissions of the defendants C. & S., who were mere trespassers, were sufficient evidence of title to constitute plaintiff's acts of entry on the land constructive possession of it by him; and the onus was on the defendants of shewing either that St. G. had no title or that any title acquired by the plaintiff under him had been lost.—Held, also, that although by the agreement time was of the essence thereof, and there was default made, there was no default when the trespasses were committed, and defendants not claiming under St. G. could not set up his right to avoid the agreement, but as it was suggested that St. G. might also bring an action for the same trespasses, a release thereof from him was directed to be filed. With respect to two other defendants P. S. and F., the verdict was set aside, for not only was there no evidence against them, but the record was defective in that an interlocutory judgment had been signed against them for non-appearance, without their having been declared against. *Johnston v. Christie et al.*, 31 C. P. 358.

Per Burton, J. A. The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against trespasser in his own name. He is still bound to sue in the name of his trustee. *Adamson v. Adamson*, 7 A. R. 592.

Actual occupation of land is not essential to give a right to maintain trespass by one who has the legal title. It is sufficient that he enter upon the land so as to put himself in legal possession of it.—Held, that putting up boards on the land by the owner, stating that the land was for sale, was a sufficient entry upon his part to vest the legal possession in him to enable him to maintain formally an action of trespass. *Donovan v. Herbert*, 4 O. R., C. P. D. 635.

See *McConaghy et al. v. Denmark*, 4 S. C. R. 609, p. 422.

3. *Several Trespasses*.

See *Ross v. Hunter*, 7 S. C. R. 289, p. 702.

4. *Damages*.

The deed contained two several parcels of land and the plaintiff was evicted from one, but was still owner of the most valuable parcel.—Held, that the measure of damages was not the whole purchase money, but only the proportionate value of that part to which the title failed. *McKay v. McKay*, 31 C. P. 1.

See *Douglas v. Fox et al.*, 31 C. P. 140, p. 502; *Mitchell v. McDuffy*, 31 C. P. 266, 649, p. 211; *Robinson v. Hall*, 1 O. R. 266, p. 457.

5. *Injunction to Restrain Trespass*.

See *Grand Trunk R. W. Co. of Canada v. Credit Valley R. W. Co. et al.*, 27 Chy. 232, p. 344; *Fenelon Falls v. Victoria R. W. Co.* 29 Chy. 4, p. 343.

6. Effect of Judgment in Trespass.

A judgment in favour of the plaintiff in an action for trespass to lands upon pleas (amongst others) of land not plaintiff's and liberum tenementum, is not a complete estoppel, preventing the defendant in another suit, from questioning the plaintiff's title to any part of the lands. The judgment is only an estoppel with regard to the title of that portion of the land upon which it had been shewn that the defendant had trespassed. *Hunter v. Birney*, 27 Chy. 204.

II. FOR MALICIOUS PROSECUTION.

See *Macdonald v. Hemwood et al.*, 32 C. P. 433, p. 443.

III. FALSE IMPRISONMENT.

The 41 Vict. c. 9, intituled "An act to widen and extend certain public streets in the city of St. John," authorized commissioners appointed by the governor in council to assess owners of the land who would be benefited by the widening of the streets, and in their report on the extension of Canterbury street, the commissioners so appointed assessed the benefit to a certain lot at \$419.46, and put in their report the name of the appellant (McS.) as the owner. The amount so assessed was to be paid to the corporation of the city, and, if not, it was the duty of the receiver of taxes appointed by the city corporation, to issue execution and levy the same. McS., although assessed, was not the owner of the lot. S., the receiver of taxes, in default, issued an execution, and for want of goods McS. was arrested and imprisoned until he paid the amount at the chamberlain's office in the city of St. John. The action was for arrest and false imprisonment, and for money had and received. The jury found a verdict for McS. on the first count against both defendants:—Held, (reversing the judgment of the Supreme Court of New Brunswick), that S., who issued the warrant founded upon a void assessment and caused the arrest to be made, was guilty of a trespass, and being at the time a servant of the corporation, under their control and specially appointed by them to collect and levy the amount so assessed, the maxim of respondeat superior applied, and therefore the verdict in favour of McS. for \$635.39 against both respondents on the first count should stand. (Ritchie, C. J., and Taschereau, J., dissenting.) Per Gwynne, J.: That the corporation had adopted the act of their officer as their own by receiving and retaining the money paid and authorizing McS.'s discharge from custody only after such payment. *McSorley v. The Mayor &c., of the City of St. John et al.*, 6 S. C. R. 531.

See *Reid v. Maybee*, 31 C. P. 384, p. 404; *McLellan v. McKinnon*, 1 O. R. 219, pp. 331, 404.

TRIAL.

I. NOTICE OF TRIAL AND ASSESSMENT, 764.

II. CONDUCT OF CAUSES, 765.

III. EVIDENCE AND WITNESSES — See EVIDENCE.

IV. REFERENCE FROM SUPERIOR TO COUNTY COURT AND VICE VERSA, 766.

V. POSTPONEMENT OF TRIAL, 766.

VI. QUESTIONS SUBMITTED TO AND FINDINGS BY JURY—See JURY.

VII. MISCELLANEOUS CASES, 766.

VIII. OF CONTESTED ELECTIONS—See PARLIAMENTARY ELECTIONS.

IX. COUNTY JUDGE'S CRIMINAL COURT—See CRIMINAL LAW.

X. NEW TRIAL—See NEW TRIAL.

XI. VERDICT—See VERDICT.

I. NOTICE OF TRIAL AND ASSESSMENT.

Held, that in an action commenced by a writ not specially endorsed, where the defendant does not plead to the declaration, the plaintiff must sign interlocutory judgment against the defendant before he is in a position to serve notice of trial and assessment of damages. *Fenwick v. Donohue*, 8 P. R. 116.—Dalton, Q. C.

A summons to dismiss an action for breach of an order to examine, generally implies a stay of proceedings; but where the judge who granted the summons struck out the part relating to a stay, and the summons was afterwards enlarged without any mention of a stay, a notice of trial served while the summons was pending, was—Held, to be regular. *Merchants' Bank v. Pier-son*, 8 P. R. 129.—Dalton, Q. C.

Plaintiff's and defendant's attorneys had an arrangement between themselves by which papers in the suit should be sent by mail. The notice of trial was posted the day before the last for giving notice, but reached defendant's attorney one day too late. It was shewn that the practice of both attorneys had been to admit service as of the day of receipt:—Held, that the notice of trial must be set aside. *Robson v. Arbuthnot*, 3 P. R. 313, distinguished. *McDonough v. Allison*, 9 P. R. 4.—Dalton, Master

A writ in ejectment was served on the 15th August, 1881, and an appearance entered after the 22nd of the same month:—Held, that the plaintiff need not file a statement of claim, under the new practice, and that a notice of trial served immediately after the entry of the appearance was regular, the cause being then at issue. *Laidlaw v. Ashbaugh*, 9 P. R. 6.—Dalton, Master.

A cause is at issue where a joinder of issue has been delivered, or where three weeks have elapsed after statement of defence has been delivered. A notice of trial served before either of these events had happened was—Held, irregular and was set aside. *Schneider v. Proctor*, 9 P. R. 11.—Dalton, Master.

Where notice of trial has been given it cannot now be countermanded by either party. *Friendly v. Carter*, 9 P. R. 41.—Dalton, Master.—Osler.

The words "according to the present practice of the Court of Chancery," in Rule 266, are only intended to determine that the entry of the suit for trial is to be made with the proper officer of the Chancery Division, leaving the time of entry to be determined by the preceding rules, 259 and

264. Ten days' notice of trial is therefore sufficient in all cases coming within its terms. *Barker v. Furze*, 9 P. R. 83.—Proudfoot.

On the 22nd August, 1881, a replication had not been filed, but the suit was in such condition that it could then have been filed:—Held, that under the O. J. Act, Rule 494, notice of trial might be given without filing a replication. *Sawyer v. Short*, 9 P. R. 85.—Dalton, *Master*.

In an action of replevin ten days' notice of trial must be given, instead of eight days, as under the old practice. *Wallace v. Cowan*, 9 P. R. 144.—Dalton, *Master*.

The words "either party," in Rule 255, O. J. Act, mean "any party," and when an action is as to all the parties to it ripe for trial one of several defendants may bring the case on under that rule by giving notice of trial to the plaintiff and his co-defendants. *McLean v. Thompson et al.*, 9 P. R. 553.—Boyd.

II. CONDUCT OF CAUSES.

The defendants appeared by the same attorney, pleaded jointly by the same attorney, and their defence was, in substance, precisely the same, but they were represented at the trial by separate counsel. On examination of plaintiff's witness, both counsel claimed the right to cross-examine the witness:—Held, (affirming the ruling of the judge at the trial), that the judge was right in allowing only one counsel to cross-examine the witness. *Walker v. McMillan*, 6 S. C. R. 241.

Junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their leaders. *The International Bridge Co. v. The Canada Southern R. W. Co.*, 7 A. R. 226., but see 19 C. L. J. 358.

At the trial counsel for the defendant objected that there was no sufficient case made out upon one branch of the plaintiff's claim, the rectification of an agreement. The defendants' counsel thereupon declined to argue the point until the evidence was closed, and the defendants then called one witness upon another point: as to the rectification, the learned judge ruled that the plaintiff had made out no case—and as to the other points he decided in defendants' favour, and dismissed the bill, with costs. Thereupon the plaintiff appealed to this court and the decree was reversed and the relief prayed for given to the plaintiff. On settling the certificate of judgment the solicitor for the defendants objected to that part of it which directed the taking of the accounts between the parties, and that credit should be given for \$40,000, the value of the plant, &c., seeking to have the action remitted to the court below, in order to conclude the trial and take such evidence as the respondent might adduce in support of his defence, and moved the court to vary the certificate accordingly:—Held, that the defendant was bound by the course which he had elected to adopt, and the application was refused, with costs. *Macdonald v. Worthington et al.*, 7 A. R. 531.

Where defendant claims a remedy over against a third party. See *The Corporation of the Town of Dundas v. Gilmour et al.*, 2 O. R. 463, p. 605.

IV. REFERENCE FROM SUPERIOR TO COUNTY COURT AND VICE VERSA.

See *Merchants' Bank v. Broker*, 8 P. R. 133, p. 169; *Barker v. Leeson*, 9 P. R. 107, p. 170.

V. POSTPONEMENT OF TRIAL.

W. (plaintiff) entered into negotiations with S. (defendant) to purchase a house which defendant was then erecting. W. alleged that the agreement was, that he should take the land (2½ lots) at \$100 a lot of fifty feet frontage, and the materials furnished and work done at its value. In August, 1874, a deed and mortgage were executed, the consideration being stated in both at \$5,926. The mortgage was afterwards assigned to the M. and N. W. L. Company. W. alleged in his bill, that S., in violation of good faith, and taking advantage of W.'s ignorance of such matters, and the confidence he placed in S., inserted in the mortgage a larger sum than the balance due as a fair and reasonable market value of the lands, and of what he had done to the dwelling house and other premises, and he prayed an account. S. repudiated the allegation of fraud, and alleged that W. had every opportunity to satisfy himself, and did satisfy himself, as to the value of what he was getting; that he had told the plaintiff he valued the land at \$2,000, and that in no way had he sought to take advantage of the plaintiff. S. was unable to be present at the hearing, and applied for a postponement, on the grounds set forth in an affidavit, that he was a material witness on his own behalf, and that it was not safe for him, in his state of health, to travel from Ottawa to Winnipeg. Dubuc, J., refused the postponement, on the ground that the court was only asked now to decree that the account should be opened and properly taken, and the amount ascertained, which would be done by the master if the court should so decide, and that the defendant would then have an opportunity of being present, and that he was not necessarily wanted at the hearing; and, as the result of the evidence, made a decree in accordance with the contentions of the plaintiff, and directed an account to be taken:—Held, that under the circumstances, the case ought not to have been proceeded with in absence of appellant, and without allowing him the opportunity of giving his evidence. Per Ritchie, C. J., and Strong and Gwynne, JJ., that on the merits there was no ground shewn to entitle the plaintiff to relief. Per Ritchie, C. J., and Strong, J., that the bill upon its face alleged no ground sufficient in equity for relief, and was demurrable. *Schultz v. Wood*, 6 S. C. R. 585.

The plaintiff gave notice of trial for 2nd October. On 23rd September the defendant obtained an order to postpone the trial on payment of costs:—Held, a conditional order not staying the plaintiff's proceedings, and one which the defendant was at liberty to abandon without being liable to pay other than the costs of the application. *Allen v. Mathers*, 9 P. R. 477.—Osler.

VII. MISCELLANEOUS CASES.

Amendment at trial by striking out item from particulars. See *Davidson v. The Belleville and North Hastings R. W. Co.*, 5 A. R. 315, p. 168.

Observation on the difference between an election trial and a trial *à nisi prius*. See *Peel Election (Ont.)—Hurst v. Chisholm*, 1 H. E. C. 485.

Where in 1875, in an action of ejectment the parties agreed in writing that a verdict be entered for the plaintiff, but not enforced till defendant be paid \$50 for costs and the value of his improvements, said value to be fixed by arbitration; and, though the \$50 had not been paid, nor the said value so ascertained, plaintiff entered judgment on the verdict, and ejected the defendant, whose devisee now filed this bill, claiming possession, damages, a reference as to improvements, and an order for payment of the amount found due, and of the \$50 for costs:—Held, that though the judgment could not be set aside, and possession given to plaintiff, the plaintiff was entitled to a reference as prayed, with costs. *Watson v. Ketchum*, 2 O. R., Chy. D. 237.

TROVER.

In trover for goods against an assignee in insolvency:—Held, following *In re Barrett*, 5 A. R. 206, that the assignee may object to the absence of a bill of sale on an alleged sale by the insolvent just as an execution creditor or subsequent purchaser for value may do. *Snarr v. Smith*, 45 Q. B. 156.

The plaintiff alleged in one count in trover that the defendant converted to his own use, or wrongfully deprived the plaintiff, &c.:—Held, overruling *Bain v. MacKay*, 5 P. R. 471, that the count was not embarrassing. *Taylor v. Adams*, 8 P. R. 66.—*Dalton*, Q. C.

In an action of trover or conversion against appellant, high sheriff of the county of Cumberland, N. S., to recover damages for an alleged conversion by the appellant of certain personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were a denial of the conversion, no property in plaintiff, no possession or right of possession in plaintiff and justification under a writ of execution against the execution debtor. The learned judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shewn the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence":—Held, that the sheriff was entitled under his pleas to have it left to the jury to say whether the plaintiff had shewn title or right of possession to the goods in question, and therefore there was misdirection. *McLean v. Hannon*, 3 S. C. R. 706.

Action of trover charging the appellants with converting 250 barrels of mackerel, which were the property of W. M. R. the respondent's assignor. One of the branches of appellants' business was supplying merchants who were connected with the fishing business in the country, and who in return sent them fish, which was sold and the proceeds placed by appellants to credit of their customers. One S., who so dealt with appellants, in October, 1877, sent

them 77 barrels of herring and 236 barrels of mackerel. On 3rd November, 1877, S. sold all the fish he had, including those mackerel, to one R. at \$8 a barrel, when some were delivered, leaving 236 barrels in the appellants' store, and in payment received \$4000 and a promissory note for \$4000 at four months. This note was given to appellants by S. on account of his general indebtedness. On the 4th March, 1878, R. became insolvent, and the respondent who was subsequently appointed assignee, demanded the 236 barrels of mackerel and brought an action to recover the same. After issue was joined the appellants proved against the estate of R. on the note and received a dividend on it. The chief justice at the trial gave judgment for \$1888, less \$46.10 for one month's insurance and six months' storage, and found that the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting:—Held (*Strong, J.*, dissenting) that the appellants having failed to prove the right of property in themselves, upon which they relied at the trial, the respondent had, as against the appellants, a right to the immediate possession of the fish. 2. That S. had not stored the fish with appellants by way of security for a debt due by him, and as the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, to which statement they made no objection, but proved against the estate for the whole amount of insolvents' note, and received a dividend thereon, they could not now claim the fish or set up a claim for lien thereon. *Troop et al. v. Hart*, 7 S. C. R. 512.

See *Stoeser v. Springer*, 7 A. R. 497, p. 704.

TRUSTS AND TRUSTEES.

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II. TRUSTEES.

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V. IMPROVEMENTS ON TRUST PROPERTY—See IMPROVEMENTS ON LAND.

VI. QUALIFICATION OF TRUSTEES AS VOTERS—See PARLIAMENTARY ELECTIONS.

I. NOTICE OF TRUST.

G. W. F., being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half of the lot to J. B. P., who conveyed it to trustees, to hold in

trust for E. F., wife of G. W. F., upon certain trusts declared in the deed, and without power to her to anticipate. The deficiency was subsequently discovered and upon the application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land, as compensation for the deficiency was made to the trustees of E. F. describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P., of the first part, and E. F., wife of G. W. F., of the second part, and the trustees of the third part, which recited the facts and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F., whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. After this the trustees, by the direction of G. W. F. conveyed to E., under whom the defendants' claimed. E. F. now brought this action to recover the land:—Held, (Hagarty, C. J., dissenting) that E. and those claiming under him must be held to have had notice of the title of the trustees, who were described in the patent as trustees of E. F.: that this land was subject to the trusts of the previous conveyance to them: that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover:—Held, also, that there should be a reference to the master to take an account of taxes paid and permanent improvements made upon the lands, further consideration being reserved. Per Hagarty, C. J. The legal estate being in the defendant by conveyance from the trustees, the plaintiff should shew an equity to recover what she claimed as part of the trust estate, which she had not done; that the patent to the trustees, though describing them as such, did not in terms declare any trust respecting this land, and it could not be assumed that it formed part of the trust premises. Per Armour, J. The case was not within R. S. O. c. 95, s. 4, as to improvements under a mistake of title, but was governed by the principles of equity governing the relationship of trustee and cestui que trust. Per Cameron, J. The case was within the statute. *Foott v. Rice et al.*, 4 O. R., Q. B. D. 94.

II. TRUSTEES.

1. Appointment of Trustees.

See *In re Treleven and Horner*, 28 Chy. 624, p. 770.

2. Duties and Liabilities.

Land was settled on a trustee, in trust for the use of H. till marriage, and then upon other trusts for the husband and wife as tenants for life, and ultimately providing for the issue; the assent of the tenant for life was necessary for a sale; and there was power in the deed to appoint H. as a trustee on the original trustee refusing, &c., to act. The trustee had an absolute discretion as to forfeiting and applying the estate among or for the benefit of the parties to the deed in case

of anticipation or attempted anticipation:—Held, that the consent of H. and his wife, as tenants for life, satisfied the condition as to the assent in case of a sale: that H., as trustee, was entitled to receive the purchase money, and that the purchaser was not bound to see to its application. *In re Treleven and Horner*, 28 Chy. 624.

It having been suggested by the court that the appointment of H. as trustee, was not one which the court would have made, the matter again came on for argument, when it was—Held, that H. was placed in a position in which his interest as one of the parties to the deed upon forfeiture might conflict with his duty as trustee, and that the court would not have made and could not sanction his appointment. *Id.*

In re Toronto Harbour Commissioners, 28 Chy. 195, p. 771; *In re Jarvis v. Cook*, 29 Chy. 303, p. 468.

3. Compensation and Allowance.

What is proper compensation to be allowed to a trustee for his management of the trust estate is a matter of opinion, and even if, in granting the allowance, the court below may have erred on the side of the liberality, that alone is not sufficient ground for reversing the judgment. Where the master at Guelph had allowed \$125, which the court, on appeal, increased to \$250, this court refused to interfere. *McDonald et al. v. Davidson*, 6 A. R. 320.

Trustees on assuming the trust estate are not to be allowed a commission for merely taking the same over; but trustees, properly dealing with the estate, and handing it over on the determination of the trust, are entitled to one commission, for the receipt and proper application of the estate, payable out of the corpus. *Re Berkeley's Trusts*, 8 P. R. 193.—Blake.

Trustees are not entitled to a commission for the investment or re-investment of the funds of the estate. They are entitled to a commission on the receipt and payment of the income of the estate, payable out of the income, and to a compensation for looking after the estate, payable out of the corpus. *Id.*

Trustees may not unreasonably be allowed something for services not covered by the commission awarded. *Id.*

The master has power to allow a lump sum to a trustee as his remuneration for the care and management of real estate, but to entitle him to such sum there ought to be evidence to enable the court reasonably to see that the services for which such sum is asked have been rendered, and to make a proper allowance therefor. Where a master fixed a sum, on evidence not sufficiently particular, the case, on appeal, was referred back to him, with leave to the trustee to give proper evidence. The trustee to pay the costs of the appeal and the additional costs in the master's office. *Stinson v. Stinson*, 8 P. R. 560.—Ferguson.

Held, following the case of the Commissioners of the Cobourg Town Trust, 22 Chy. 377, that the commissioners of the Toronto Harbour were entitled to compensation for their services; and this whether the harbour belonged to the Dominion or the Provincial Government, as in the event of it being found to belong to the

Dominion it must be assumed that the Dominion Government intended the commissioners to be subject to the law of the province in which the trust was to be administered. The sum to be allowed should be such as would be a reasonable compensation for the services rendered, and at the same time such a moderate amount as would not be an inducement to members of the city council, or of the board of trade, or others, to seek the office for the sake of the emolument. The duties of the office being shewn to be not at all onerous, an allowance of \$50 a year was named as sufficient to obtain the services of the right class of men to discharge them. *Re The Toronto Harbour Commissioners*, 28 Chy. 195.

The rule that a trustee must not have a personal interest in conflict with his duty as such trustee, applies as well to public as to private trusts. Therefore, where one of the commissioners of a harbour had large landed interests adjacent to and upon one part of it, and was interested in having that portion of the harbour improved, the court (Spragge, C.), on directing an allowance to be made to the commissioners for their services, expressly excepted the commissioner so interested from participating therein, and this although he had not applied for any compensation and had at the board of commissioners opposed any such allowance being made. *Ib.*

See *Hayes v. Hayes*, 29 Chy. 90, p. 641; *Burn v. Gifford et al.*, 8 P. R. 44, p. 734.

4. Purchase or Lease of the Trust Property by Trustees.

L. and S. were appointed by the Court trustees for the plaintiff, a married woman, upon a written consent purporting to be signed by them agreeing to act. Subsequently L. obtained from the plaintiff a lease of the trust estate to himself, at what was alleged to be an inadequate rental. Some years afterwards, and after the death of her husband, the plaintiff instituted proceedings to have the lease cancelled, alleging as grounds of relief, inadequacy of rent, want of proper advice by the plaintiff in the execution thereof, and the fiduciary relation towards herself which L. had assumed. Under the circumstances the Court (Spragge, C.) granted the relief asked, notwithstanding L. swore that he was not aware that he had been appointed trustee; that he never signed the consent to act as such, and that his conduct throughout had been bona fide, it being shewn that he had effected an insurance upon the building situate upon the premises, the application for which he had signed as trustee, and there being reason to believe that if he had not signed the consent himself he had authorized the husband of the plaintiff to affix his signature thereto; but gave L. the option of accepting a new lease of the property to be settled by the master; which decree was affirmed by the full Court on rehearing. *Seaton v. Lunney*, 27 Chy. 169.

The plaintiff was mortgagee of certain lands, and by the will of the mortgagor was devisee thereof in trust to pay certain legacies charged thereon—amongst others one to the defendant, an infant about ten years old. Having instituted proceedings against the defendant to enforce

payment of the mortgage, the conduct of the sale was given to the guardian of the infant, and the plaintiff had liberty to bid at the sale under the decree as mentioned, 27 Chy. 576:—Held, (reversing the order then made,) that the liberty to bid accorded the plaintiff, who occupied the two-fold character of mortgagee and trustee, was given him for the purpose of protecting his interests as mortgagee, but did not absolve him from the duty which, as trustee, he owed to the infant; and that the conduct of the plaintiff prior to and at and about the sale, as set out in the case, by means of which he had been enabled to make a profit at the expense of the infant cestuique trust, was such as would have rendered the sale invalid if the land had remained in his hands; but as it had passed into those of an innocent purchaser the plaintiff should be charged with the outside selling value of the estate at the time of the sale, or should pay to the defendant the amount due to him under the will, with interest thereon from the date of the sale, together with the costs of the Court below subsequent to the petition, and also the costs of appeal. *Ricker v. Ricker*, 7 A. R. 232.

Purchase of client's property by solicitor. See *Kilbourn v. Arnold*, 6 A. R. 158, p. 43.

See also PRINCIPAL AND AGENT VII., 1 p. 648.

5. Liability for Acts of Co-Trustee.

A testator who, by his will, expressed the fullest confidence in C. (one of his trustees), directed them to be guided entirely by the judgment of C. as to the sale, disposal, and reinvestment of his American securities, and declared that his trustees should not be responsible for any loss occasioned thereby. C. having made unauthorized investments of these moneys which proved worthless, the master charged his co-trustee B. with the amount thereof:—Held, that even if at the suit of creditors B. might have been chargeable, yet as against legatees he was exonerated. *Burritt v. Burritt*, 29 Chy. 321.

III. LIMITATION OF ACTIONS AND SUITS IN CASES RELATING TO TRUSTS.

Ferguson v. Ferguson, 28 Chy. 380, p. 435; *Cook v. Grant*, 32 C. P. 511 p. 437; *Re Kirkpatrick et al. v. Stevenson et al.*, 3 O. R. 361, p. 438; *Cameron v. Campbell*, 7 A. R. 361, p. 439; *Adamson v. Adamson*, 7 A. R. 592, p. 428.

IV. MISCELLANEOUS CASES.

Where the assignee of an insolvent estate transferred the money to the credit of the estate account in a bank to his own private account and then used it for his own private purposes, the bank deriving no benefit from the transfer and it not appearing that the assignee was indebted to the bank:—Held, that the bank was not liable to repay the amount to the estate. *Clench v. The Consolidated Bank of Canada*, 31 C. P. 169.

The operation of an ordinary deed of bargain and sale under the Short Forms Act—R. S. O. c. 102—conveying lands to trustees considered and acted on. *Seaton v. Lunney*, 27 Chy. 169.

Creation of trusts under building contract in favour of sub-contractors. See *Forhan v. La-londe*, 27 Chy. 600, p. 419.

Right of equitable tenant in fee simple to re-conveyance of trust property. See *Farrell v. Cameron*, 29 Chy. 313, p. 319.

Per Hagarty, C. J. It is the duty of a solicitor to inform his client, when a trustee, as to the advisability of taking proceedings and incurring costs, when it may become a question whether the costs will have to be paid out of his private funds or out of the trust fund or estate. *Butterfield v. Wells*, 4 O. R., Q. B. D. 168.

Misapplication of moneys assessed under drainage by-law.—Trust created. See *Smith v. The Corporation of the Township of Raleigh*, 3 O. R. 405, p. 489.

Attaching trust moneys. See *Lloyd v. Wallace*, 9 P. R. 335, p. 34.

Pleading. See *McLean v. Bruce*, 29 Chy. 507, p. 624.

Qualification of trustees as voters. See *South Grenville Election (Ont.) Ellis v. Fraser*, 1 H. E. C. 163, p. 525.

See also *Parr v. Montgomery*, 27 Chy. 521, p. 306; *Adamson v. Adamson*, 7 A. R. 592, p. 428.

ULTRA VIRES.

See CONSTITUTIONAL LAW.

UMPIRE.

See ARBITRATION AND AWARD.

UNDUE INFLUENCE.

See FRAUD AND MISREPRESENTATION—PARLIAMENTARY ELECTIONS.

USAGE.

See CUSTOM AND USAGE.

USES AND TRUSTS.

The operation of an ordinary deed of bargain and sale under the Short Forms Act R. S. O. c. 102, conveying lands to trustees considered and acted on. *Seaton v. Lunney*, 27 Chy. 169.

A husband and wife were the parties of the third part in a conveyance, whereby the wife's father did "grant unto the said party of the third part his heirs and assigns forever," &c., habendum "unto the said party of the third part his heirs and assigns, to and for his and their sole and only use forever":—Held, that by the operation of the statute of uses, the husband took an estate in fee simple. *Re Young*, 9 P. R. 521.—Boyd.

USURY.

See PAWNBROKER.

VACATION.

A master's report made during long vacation in contravention of G. O. 425, is as against a defendant having no notice of the proceedings on which the report is founded, entirely null and void. *Fuller v. McLean*, 8 P. R. 549.—Boyd.

See *Sieveurwright v. Leys*, 9 P. R. 200, p. 631.

VALUATOR.

The defendant, by a certificate signed by him as reeve of the township, stated he had personal knowledge of property belonging to one A. M., and occupied by him, which the defendant believed to be worth \$2,000, and would readily sell at a forced cash sale for \$1,600: that about fifteen acres were cleared and ready for or under cultivation, &c., setting forth further favourable particulars as to buildings on the land and the nature of the soil, all of which proved to be erroneous. In fact the defendant had not any personal knowledge of the premises, which were almost worthless: and the particulars as given had been communicated to him by A. M. himself. The defendant was aware that the plaintiffs were about to advance money by way of loan on the security of this property, and had called for his certificate, by which they said they would be guided in making such advance. The court, under these circumstances—Held, the defendant answerable for the loss sustained by the plaintiffs in consequence of having acted on his certificate, although no fraud was attributable to him, and his services were gratuitous. *Gowan v. Paton*, 27 Chy. 48.

The defendant, who was employed on behalf of the plaintiff to value certain lands, intended to certify the value at \$2,000, but through the fraud of the agent he was induced to certify for \$3,000:—Held, affirming the decree of Blake, V. C., (26 Chy. 390,) that the defendant was not liable for any loss sustained by the plaintiff:—Held, also, that the circumstances of this case would not justify the court in reversing the finding of the judge of first instance, that the valuation was made without fraud or intention to deceive. *Silverthorn v. Hunter et al.*, 5 A. R. 157.

Per Burton, J. A., a valuator is not liable for negligence in making a valuation of land, on which a loan is procured, unless it be fraudulently made. *Ib.*

The paid agent of a loaning society, who professed to be skilled, and had a knowledge in the valuing of lands, was held liable to the society for a loss sustained by them by reason of a false report of such agent. *Silverthorn v. Hunter*, 5 A. R. 157, distinguished. *Hamilton Provident and Loan Society v. Bell*, 29 Chy. 203.

In order to render the paid valuator of a loan company answerable for a loss caused by excessive valuation of property, it is not necessary to

shew that such valuation is made fraudulently. *The Canada Landed Credit Co. v. Thompson et al.*, 8 A. R. 696.

The Court below dismissed a bill filed to enforce a claim for damages sustained by an excessive valuation of land by the brother and partner of the paid valuator duly appointed by the plaintiffs, on the ground that it was not shewn that the valuation was made fraudulently. This court, while differing from such view, declined to reverse the decree and ordered a new trial, at which the evidence of one of the defendants already taken might be used, in the event of his then being out of the jurisdiction, but ordered the defendants to pay the costs of the appeal; the new trial to be without costs in the court below. *Id.*

See *Agricultural Investment Co. v. The Federal Bank*, 6 A. R. 192, p. 68; *Moberly v. Brooks*, 27 Chy. 270, p. 289.

VENDITIONI EXPONAS.

See EXECUTION.

VENDORS AND PURCHASERS ACT.

A testatrix devised to trustees all her estate, real and personal, which, or a sufficient portion of which, they were to dispose of for payment of debts, and the support and education of her two youngest daughters C. and M. during their minorities, excepting two tenements known as the Westminster property, which were to be reserved for the use of C. and M. so long as they or either of them should remain unmarried, and in order that C., on attaining 21 and being unmarried, might in her option occupy and enjoy for her life, so long as she should be unmarried, one of the houses for her own residence and that of her sister; and, in the event of her marriage, the youngest daughter M. was to have the same option and choice, the intention of the testatrix "being that in addition to their support and maintenance out of all of my estate, as devised, my youngest daughters C. and M. shall have a home within their control so long as they or either of them shall remain unmarried;" and upon the marriage of both C. and M. the whole of such Westminster property was to be sold, and the proceeds thereof to form part of the residuary estate and be divided amongst all her children, sons and daughters, then living, share and share alike. C. and M. attained majority and were unmarried, when all the children, including C. and M., together with the trustee, joined in a contract to sell the Westminster property. In answer to a question submitted to the Court, under the Act (R. S. O. c. 109), it was—Held, that all these parties joining in a conveyance, a good title could be made; and although in applications of this kind the costs are in the discretion of the Judge, the purchaser was ordered to pay the costs. *Givins v. Darvill*, 27 Chy. 502.

Though on a bill filed for specific performance if the infant children ultimately entitled under the settlement were made parties, the court might order the completion of the sale and payment of the money into court for investment,

where the corpus of the estate would be protected for the children, yet on application under the Vendors and Purchasers' Act, in the absence of the other parties to the settlement, it would not compel the purchaser to accept the title. *In re Treleven and Horner*, 28 Chy. 624.

Held, that a mortgage which contains an acknowledgement of receipt of the mortgage money, but no covenant for repayment of money does not of itself afford conclusive evidence of a debt, so that the mortgagee or his assigns can maintain an action for its recovery. In this case it was shewn that no money was ever advanced by the mortgagee to defendant, the mortgagor, but that the mortgage was given for a debt due by defendant to one C., who in consideration of getting it agreed to relieve defendant from all personal liability; and the plaintiffs, assignees of the mortgage, were held not entitled to recover. Quære, whether sec. 1, sub-sec. 4, and sec. 2 of the Vendors and Purchasers Act, R. S. O. c. 109, apply to such an action as this, or only to actions where the title to land is in question. *The London Loan Co. v. Smyth*, 32 C. P. 530.

On a petition under the Vendors' and Purchasers' Act, the question of the existence or the validity of the contract for sale cannot be tried, but only those matters which would be entertained upon a reference as to title under a decree for specific performance. The only parties necessary on such a petition are those who would be parties to a suit for specific performance, and therefore mortgagees who had been joined were dismissed with their costs. *Re MacNabb*, 1 O. R., Chy. D. 94.

Semble, that R. S. O. c. 109 s. 2 is retrospective so as to cast the onus of disproving the payment of the consideration on the party impeaching a conveyance as voluntary even though the transaction took place prior to that enactment. *Sanders v. Malsburg*, 1 O. R., Chy. D. 178.

Held, that on an application under R. S. O. c. 109, s. 3, the question of the abandonment of the contract between the parties cannot be raised. *Henderson v. Spencer*, 8 P. R. 402—Spragge.

Held, that the Act (R. S. O. c. 109) was intended to provide for a simple case where there was no dispute as to the validity of the contract and that the court ought not to enter upon the question of the validity of the title, until it was decided that the contract was binding. *Henderson v. Spencer*, 8 P. R. 402, not followed. *Re Robertson and Daganeau*, 9 P. R. 288.—Boyd.

See *Re Inglehart and Gagnier*, 29 Chy. 418, p. 95.

VENUE.

See PATENT OF INVENTION—PLEADING.

VERDICT.

I. INTEREST ON, 777.

II. MISCELLANEOUS CASES, 777.

III. QUESTIONS SUBMITTED TO AND FINDINGS BY JURY.—See JURY.

IV. NEW TRIAL WHEN VERDICT IS AGAINST EVIDENCE OR THE WEIGHT OF EVIDENCE.—See NEW TRIAL.

I. INTEREST ON.

In an action against the sureties of an absconding assignee in insolvency, on the assignees bond to the Queen under the statute, a verdict was entered at the trial for \$800, subject to a legal question, which was afterwards decided in favour of the plaintiff. It was agreed by the parties that in case of such a decision, the amount for which the verdict should be entered was \$700 :—Held, that the verdict was not for a debt or sum certain within R. S. O. c. 50, s. 269, and that it should not carry interest from its entry. *Woodruff v. Canada Guarantee Co.*, 8 P. R. 532.—Hagarty.

See *Quinlan v. Union Fire Ins. Co.*, 8 A. R. 376, p. 179.

II. MISCELLANEOUS CASES.

The Court refused to quash a conviction under the liquor license Act, affirmed on appeal, on the ground among others that the general verdict of guilty was inconsistent with the answers of the jury to specific questions. See *Reginav. Grainger*, 46 Q. B. 382, p. 730.

Verdict subject to opinion of the Court.—Power of Court. See *Creighton v. Chittick et al.*, 7 S. C. R. 348, p. 56.

Commission allowed by jury without any evidence to support finding. See *The Corporation of the Town of Welland v. Brown*, 4 O. R. 217, p. 27.

VESSEL.

See SHIP.

VESTING ORDER.

See SALE OF LAND BY ORDER OF THE COURT.

VOLUNTARY CONVEYANCE.

See FRAUD AND MISREPRESENTATION—FRAUDULENT CONVEYANCES.

A mortgage which had been executed by the defendant I. reciting that it had been agreed to be given to secure notes held by the plaintiffs and containing covenants for title was reformed on parol evidence by substituting for one of the parcels inserted by mistake which did not belong to I., another lot proved to be his at the time of creating the mortgage, and was the only other lot owned by him. Such a mortgage is not voluntary or without consideration so as to exclude reformation. *Bank of Toronto v. Irwin*, 28 Chy. 397.

The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside. The plaintiff, who had just come of

age, being about to marry, applied to her solicitor who was also her guardian, for advice as to her property, and had several consultations with him, at which the heads of a marriage settlement were agreed upon. The solicitor did not know the husband, and acted solely in the interests of the plaintiff. Nothing was said about a power of revocation in the settlement, which contained the usual clauses, but gave rather more power than usual to the plaintiff, and was made in consideration of marriage :—Held, that it was not a voluntary settlement ; and that, as it contained the usual clauses in such deeds, and simply omitted a power of revocation, which is not usual in settlements for value, there was no evidence of improvidence, or ground for setting it aside, in the absence of fraud or mistake. *Hillock v. Button*, 29 Chy. 490.

Held, that 42 Vict. c. 22, s. 2, Ont. (amending the law of Dower) does not apply to a case of voluntary sale by a husband. See *Calvert v. Black*, 8 P. R. 255, p. 222.

See *Sanders v. Malsburg*, 1 O. R., 178, p. 325.

VOTERS LISTS.

See PARLIAMENTARY ELECTIONS.

WAGES.

See MASTER AND SERVANT.

WAIVER.

I. OF SECURITY FOR COSTS—See COSTS.

II. ESTOPPEL—See ESTOPPEL.

III. LACHES—See LACHES.

IV. OF CONDITIONS IN INSURANCE POLICIES—See INSURANCE.

The obtaining of an order for time to reply waives an objection that no notice to reply was served, and takes the place of such notice. *Lock v. Todd*, 8 P. R. 60.—Dalton, Q. C.

Held, that in this case the defendant was precluded by having accepted service of the writ with knowledge of certain irregularities and delayed moving after the time for pleading had expired. *Regina v. Stewart*, 8 P. R. 297.—Osier.

Of objection to jurisdiction by application for new trial. See *In re Evans v. Sutton et al.*, 8 P. R. 367, p. 219.

Of irregularity in return of commission. See *Darling v. Darling*, 9 P. R. 560, p. 245.

Of conditions for inspection of grain. See *Goodall v. Smith*, 46 Q. B. 388, p. 714.

Of forfeiture by breach of covenant to repair. See *Leighton v. Medley*, 1 O. R. 207, p. 408.

Of excessive consignment of goods. See *Good-year Rubber Co. v. Foster*, 1 O. R. 242, p. 715.

Of service of summons. See *Regina v. Bennett*, 3 O. R. 45, p. 100.

Where a sheriff seizes goods under writs of execution, and a mortgagee lays claim to them under a chattel mortgage, the fact that he subsequently directs the sheriff to sell under the executions, does not necessarily amount to a waiver of his claim under the mortgage. *Segsworth v. Meriden Silver Plating Co.*, 3 O. R., Chy. D. 413.

By appearance and pleading to summons of justice of the peace. See *Regina v. Bernard*, 4 O. R. 603, p. 403.

WALL.

See BUILDINGS.

WAREHOUSEMEN AND WAREHOUSE RECEIPTS.

See BILLS OF LADING AND WAREHOUSE RECEIPTS.
—RAILWAYS AND RAILWAY COMPANIES.

WARRANT FOR ARREST.

The prisoner was arrested in Toronto, upon information contained in a telegram from England, charging him with having committed a felony in that country, and stating that a warrant had been issued there for his arrest:—Held, that a person cannot, under the Imperial Act, 6 & 7 Vict. c. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and endorsed by a judge of a superior court in this country. Such warrant must disclose a felony according to the law of this country, and Semble, that the expression "felony, to wit, larceny," is insufficient. The prisoner was therefore discharged. *Regina v. McHolme*, 8 P. R. 452.—Cameron.

See *Reid v. Mayber*, 31 C. P. 384, p. 404; *Regina v. Bernard*, 4 O. R. 603, p. 403.

WARRANTY.

See INSURANCE.

The defendants bought a vessel from the plaintiff, who, as the jury found, warranted her to class B. 1, and promised to get her insured in a company, of which he was agent, for \$1,400. She would not class as B. 1, and no insurance could be effected under that class; but defendants sailed her uninsured until she foundered and was totally lost. In an action for the purchase money:—Held, that the measure of damages to which defendants were entitled for breach of the warranty was not the \$1,400 for which she might have been insured, but the sum which it would have taken to make her class B. 1, which it was for defendants to shew. A mortgage was executed to secure the purchase money, and registered with the Customs, and annexed to it was an instrument under seal, executed by defendants, reciting the mortgage, and that the terms of payment were

set forth therein for convenience of registry; and "this indenture is executed for the purpose of evidencing the true agreement between the parties, which is hereinafter stated." The terms of payment were then stated, differing from those in the registered mortgage; and defendants covenanted to insure the vessel for \$1,400, and assign the policy to plaintiff. The alleged warranty was verbal, and was not made out at the time of executing the writings, but defendants swore that they would not have bought without the warranty, and would not otherwise have given over one-third of the price for a vessel which could not be insured:—Held, that evidence of the verbal warranty was admissible: that it did not vary or alter the writings; and that the declaration that the instrument was made to evidence the true agreement referred merely to the terms of payment. *LaRoche v. O'Hagan et al.*, 1 O. R., Q. B. D. 300.

The plaintiff sued the defendant, a piano maker, for breach of a warranty given by his salesman on the sale of a piano, that the instrument was then sound and in good order. The plaintiff signed the ordinary receipt note, which is set out in the report, providing for payment of the price, and that until paid the property should remain in defendant, in which there was no mention of the warranty:—Held, that parol evidence of the warranty was admissible, as it was apparent that the receipt note was not intended to be the evidence of the whole contract. Quære, whether this question should not have been left to the jury. Held, also, that the salesman had authority to give the warranty. Quære, whether any evidence of an express warranty was necessary. Held, also, that the proper measure of damages to allow was the price which at the time of sale would have been required to remove the alleged defect, and the jury having given much more, the court named a sum to which the plaintiff might reduce his verdict, or that there should be a new trial. *McMullen v. Williams*, 5 A. R. 518.

Covenant to "warrant and defend" in assignment of patent right. See *Green et al. v. Watson*, 2 O. R. 627, p. 587.

By the Banking Act 34 Vict. c. 5, D., banks were prohibited from buying and selling goods or merchandize:—Held, therefore that an action would not lie against an incorporated bank for breach of warranty on the sale of a horse-power machine. *Radford v. The Merchants Bank*, 3 O. R., C. P. D. 529.

On sale of timber limits. See *Ducondu v. Dupuy*, 9 App. Cas. 150, p. 758.

WASTE.

Impeachment of tenant for life for waste. See *Clow v. Clow*, 4 O. R. 355, p. 799.

WATER AND WATER COURSES.

- I. ACCRETION, 781.
- II. FORMING BOUNDARIES, 781.
- III. RIGHTS AND LIABILITIES OF RIPARIAN PROPRIETORS, 782.

IV. FLOATING TIMBER, 782.

V. LIABILITY OF MUNICIPALITIES FOR INJURY CAUSED BY DRAINS AND SEWERS, 783.

VI. DITCHES AND WATERCOURSES ACT, 785.

VII. ASSESSMENT FOR DRAINAGE, 785.

VIII. DRAINAGE BY-LAWS—See MUNICIPAL CORPORATIONS.

IX. BRIDGES OVER RIVERS—See WAY.

X. HARBOURS—See HARBOUR.

I. ACCRETION.

By 10 Geo. IV., c. 11, the Cobourg Harbour Company were authorized to construct a harbour at Cobourg, and also to build and erect all such needful moles, piers, wharves, buildings and erections whatsoever, as should be useful and proper for the protection of the harbour, and to alter and amend, repair and enlarge the same as might be found expedient. The harbour company commenced their work in 1820 by running a wharf southerly from the road allowance, between lots 16 and 17 of the township of Hamilton, which now forms Division Street in the town of Cobourg. By means of the mud and earth raised by dredging and gradual accretions, which were prevented from being washed away by being confined by crib-work, the original wharf was widened to the full width of Division Street, and in addition they constructed a storehouse and placed a fence dividing it from the land which appellant (whose lot fronted on Division street, and extended to the waters' edge,) had gained by accretion since the addition to the original wharf was made. Thereupon the appellant filed a bill complaining that his access to this alluvial land was obstructed by the storehouse and fence which the respondents caused to be placed on the addition to the wharf and praying that the respondents, other than the attorney-general, be decreed to remove them:—Held, 1. That land gained by alluvial deposits arising from natural or artificial causes or from causes in part natural and in part artificial, so long as the fact is proved that the accretion was gradual and imperceptible, accrues to the owner of the adjacent land. 2. That the storehouse and fence complained of in this case were not constructed on any part of Division Street, but on an artificial structure constructed under the authority of a statute on the line of Division Street for harbour purposes, and, therefore, appellant was not entitled to be indemnified because he was denied access to his alluvial land through the premises of the respondents. 3. That the public right of way from the end of Division Street to the waters of Lake Ontario, was extinguished by statute by necessary implication. *Corporation of Yarmouth v. Simmons*, L. R. 10 Ch. D. 518, followed. *Standly et al. v. Perry et al.*, 3 S. C. R. 356; 2 A. R. 195.

II. FORMING BOUNDARIES.

River Rideau boundary between townships of Gloucester and Nepean and the city of Ottawa. See *Regina v. The Corporation of the County of Carleton*, 1 O. R. 271, p. 792.

See *McArthur v. Gillies*, 29 Chy. 223, p. 782.

III. RIGHTS AND LIABILITIES OF RIPARIAN PROPRIETORS.

Under a conveyance of land, on a stream not navigable, described as running from, &c., "south, &c., to the northern side of the * * river, * * then north-easterly along the bank of the said river, with the stream to the centre of the said lot":—Semble, that the grantee was bound by the bank of the river, and had not any right to extend the boundaries to and along the middle or thread of the stream; but, Held, whether he had or had not such right, he could not by reason thereof erect any structure in the stream that could or might affect prejudicially the flow of the water as regards other riparian proprietors. *McArthur v. Gillies*, 29 Chy. 223.

The patent from the crown of a lot of land situate on the bank of a river, reserved free access to the bank for all persons, vessels, &c. There was a quantity of stone on the lot, which the plaintiff desired to quarry, but was prevented by the penning back of the water of the river by the defendant, the owner of a mill thereon below the plaintiff's land:—Held, that the reservation by the crown in the grant was merely an easement to the public, notwithstanding which the plaintiff was a riparian proprietor, and as such entitled to complain of the injury caused by the penning back of the water. The parties desired the assistance of scientific evidence as to the height of the defendant's dam and the effect of raising it. The court (Proudford, J.) appointed an engineer to inspect and report thereon, reserving the costs until his report should be obtained. *Hawkins v. Mahaffy*, 29 Chy. 326.

A riparian proprietor has not the absolute right to the natural and unobstructed flow of the water of a stream over his lands, but his right is a qualified one, and subject to the lawful and reasonable user of the waters by a mill-owner above him on the same stream, and this although the user above him may be at times for an extraordinary purpose. *Dickson v. Carnegie*, 1 O. R., Chy. D. 110.

Obstructing flow of water to mill. See *The Muskoka Mill Co. v. The Queen*, 28 Chy. 563, p. 596.

In granted and ungranted lands. See *Regina v. Robertson*, 6 S. C. R. 52, p. 123.

IV. FLOATING TIMBER.

The plaintiff, who claimed the exclusive uses of certain streams flowing through his lands, which right the defendants denied, obtained an interlocutory injunction restraining the defendants from using his improvements thereon for floating down their logs upon the usual undertaking to pay any damages sustained thereby:—Held, reversing the order of Proudford, V. C. (Armour, J., dissenting) that the plaintiff was not entitled to an interlocutory injunction, as it was not shewn that irremediable damage would result from refusing it, or that the balance of inconvenience was in his favour. *McLaren v. Caldwell et al.*, 5 A. R. 363.

The plaintiff, a lumberman, was the owner in fee simple of several parcels of land and large tracts of timber. A stream, on parts of the bed of which he had the fee simple, ran through his

lands, which, in its natural state, had not the capacity for floating timber at any time of the year. The plaintiff and those through whom he claimed spent large sums of money in making improvements upon the stream and in deepening it, and thereby making it floatable. The defendants, who owned the timber limits in the neighbourhood, claimed the right to float their timber down the stream:—Held, reversing the judgment of Prondfoot, V.C., (Burton, J.A., dissenting), that the stream was a public waterway by virtue of C. S. U. C. c. 48, s. 15, which by its terms, applies to all streams, whether of natural capacity to permit timber to be floated down them or not; and that the defendant had the right to float timber down the same stream during the spring, summer, and autumn freshets, without compensation to the plaintiff. The appeal was allowed without costs, as the improvements had been made and the bill filed, relying on the authority of *Boale v. Dickson*, 13 C. P. 337, which was properly followed by the learned V.C., but was overruled by this court. Per Burton, J.A.—By the common law those streams only which are sufficiently large to float boats or transport property are highways by water, and not small streams which are not susceptible for use as a common passage for the public. The statute was not intended to confer any new right, but to remove all doubt as to the right of lumberers to use all streams capable, in their natural state, of transporting timber, even although only in times of freshets. *S. C.*, 6 A.R. 456.

Held, that the right conferred to float timber and logs down streams by Canadian Statute 12 Vict. c. 87, s. 5, is not limited to such streams as in their natural state, without improvements, during freshets, permit said logs, timber, &c., to be floated down them, but extends to the user without compensation of all improvements upon such streams, even when such streams have been rendered floatable thereby. *Boale v. Dickson*, 13 C. P. 337, overruled. Such right is only conferred by the statute during freshets; quære as to the rights at other seasons of the year of the parties, that is, of the lumberers on the one side, and the owners of the improvements and the bed of the stream whereon they have been effected on the other. *S. C.*, *sub-nom.*—*Caldwell v. McLaren*, 9 App. Cas. 392. Judgment of Supreme Court, 8 S. C. R. 435, reversed.

[See 47 Vict. c. 17, Ont.]

V. LIABILITY OF MUNICIPALITIES FOR INJURY CAUSED BY DRAINS AND SEWERS.

To a declaration charging negligence in the construction and maintenance of drains, in order to drain the streets of a town, whereby the drains were choked and the sewage matter overflowed into plaintiff's premises, defendants pleaded that the cause of action did not accrue within three months:—Held, bad, as sec. 491 of the Municipal Act (R. S. O. c. 174) did not apply. *Sullivan v. The Corporation of the Town of Barrie*, 45 Q. B. 12.

The plaintiff leased premises at the corner of Queen and Bathurst Streets, which ran at right angles to each other, in Toronto. There was a main sewer on Queen Street, with which plain-

tiff's private drain, constructed by the defendants at the expense of the plaintiff's lessor, connected, and which had been extended westward. There was therein, at or about Portland Street, a wall, said to be for the purpose of dividing the water and causing it to flow eastward and westward. There was a sewer on Bathurst Street, south of Queen Street. Subsequently, and about four years before the action, a sewer was constructed on Bathurst Street, north of Queen Street. Into this sewer a creek was turned, in which at times the water was six feet deep; and a number of cross streets drained thereto. Within the four years before action, but never before, the plaintiff's cellar had been flooded several times, and the cause of this action was the flooding during a steady rain of eight or nine hours duration. The plaintiff alleged originally defective construction of sewers, and negligence in not repairing, but simply proved the flooding and the above facts, and the jury found a verdict for him. A new trial was directed, *Armour, J.*, dissenting. Per Hagarty, C.J., and Cameron, J. The mere proof of the flooding did not establish a *prima facie* case of negligence against the defendants; a specific ground of negligence must be proved, and there was no sufficient evidence of position, connection, capacity, and levels of the sewers on Queen and Bathurst Streets. Per Cameron, J. Remarks as to the difference in the liability of, or injuries caused by sewers and by highways. Per *Armour, J.* The fact of the flooding of sewers constructed, controlled and managed by the defendants, was *prima facie* evidence of negligence; but the fact that no flooding had occurred before the construction of the Bathurst Street sewer north of Queen Street, coupled with the other evidence, was sufficient to shew *prima facie* that that sewer brought down more water than the Queen Street sewer, and Bathurst Street sewer, south of Queen Street, were capable of carrying away rapidly enough, and that the plaintiff was entitled to recover. *Noble v. The City of Toronto*, 46 Q. B. 519.

The defendants in 1865 passed a by-law for the construction of a drain which went through the plaintiff's land, and for assessing certain lands, including the plaintiff's, therefor. The drain was commenced in 1866 and completed. In 1873 they passed another by-law for widening and deepening this drain, which was accordingly done. In 1881, they constructed another drain running into the first below the plaintiff's land. The first drain having become out of repair and choked up, the plaintiff's lands were to some extent flooded in the spring and autumn, and the water lay longer than if the drain had been kept properly clear:—Held, affirming the judgment of Hagarty, C.J., (Cameron, J., dissenting,) that the plaintiff was entitled to recover against the defendants for their breach of duty in not keeping the drain in repair, under R. S. O. c. 174, s. 543, and that a mandamus should issue to compel the defendants to make the necessary repairs. Per Cameron, J. An action is expressly given by s. 542 for injury done by such neglect, where the drain serves two municipalities; but in a case like the present, though under s. 543 the municipality may be compelled by mandamus to repair the drain at the expense of the lands benefited, no action lies for injury caused by non-repair. *White v. Corporation of the Township of Gosfield*, 2 O. R., Q. B. D. 287.

Where a municipality, acting under the Ontario Drainage Act, in pursuance of a scheme for the drainage of their township, constructed a system by which water was drained off into a certain drain formerly constructed through the plaintiff's land and running into a natural creek, whereby the creek, by reason of the accumulation of water caused by the new drains, though sufficient before to carry off the water brought down into it, overflowed and injured the plaintiff's land:—Held, that the defendants were liable for any damage thus caused to the plaintiff, and there was nothing in the municipal or other legislation of this province to change the illegal character of such an act. It appeared, however, that the plaintiff's property had been benefited by the drainage works as a whole to a greater extent than it had been injured by the overflow complained of, and the defendants acceded to the reasonableness of the plaintiff's demand for a better outlet, and were proceeding to make it;—Held, that under these circumstances it was sufficient for the present to declare the plaintiff entitled to have the creek widened and deepened to the necessary extent within a reasonable time. *Northwood v. The Corporation of the Township of Raleigh*, 3 O. R., Chy. D. 347.

VI. DITCHES AND WATER COURSES ACT.

Held, that the defendants a railway company, were not subject to the provisions of "The Ditches and Water Courses Act," R. S. O. c. 199. *Miller v. Grand Trunk Railway Co.*, 45 Q. B. 222.

VII. ASSESSMENT FOR DRAINAGE.

See *McLean v. The Corporation of the Township of Ops*, 45 Q. B. 325, p. 488; *In re Brock v. The Corporation of the City of Toronto*, 45 Q. B. 53, p. 490.

WAY.

I. CREATION OF HIGHWAYS.

1. *Dedication*, 786.
2. *Private Way*.
- (a) *By Grant or Necessity*, 786.

II. POWERS AND DUTIES OF MUNICIPAL CORPORATIONS.

1. *Opening Roads*, 788.
2. *Closing Roads*, 788.
3. *Fencing Ditches*, 788.
4. *Repairing Roads*.—See IV., p. 790.
5. *Railways on Streets*—See RAILWAYS AND RAILWAY COMPANIES.

III. ROAD COMPANIES, 789.

IV. REPAIRING.

1. *Appropriating Material*, 790.
2. *Liability of Municipality for Negligence*, 790.
3. *Liability of Railway Companies*—See RAILWAYS AND RAILWAY COMPANIES.

V. OBSTRUCTION OF PUBLIC AND PRIVATE WAYS.

1. *Generally*, 790.
2. *By Railways*—See RAILWAYS AND RAILWAY COMPANIES.

VI. SIDEWALKS, 791.

VII. BRIDGES.

1. *Generally*, 791.
2. *Repairing*—See IV. p. 790.
3. *Injunction with respect to*—See INJUNCTION.

VIII. TOLLS, 792.

IX. TREES, 793.

X. TRACTION ENGINES, 793.

XI. QUEBEC TURNPIKE TRUST, 793.

I. CREATION OF HIGHWAYS.

1. *Dedication*.

The corporation of East Whitby by by-law closed up an old travelled road, whereby the applicant was shut out from ingress to his lands except by a short road leading to the original road allowance, which was now for the first time opened. For some years prior to 1844 the short road was used as a private road for the convenience of persons going to F.'s place, mills, brewery, and distillery. In 1844 F. conveyed the land on each side of it to his son and son-in-law, but no mention of it was made in the deeds. The wife of the purchaser from the son-in-law, while speaking to F. at one time about the title, as to which some dispute arose, complained that the old travelled road might be closed up. F. replied that they would still have the short road leading to the road allowance, which would still be opened if the old travelled road were closed:—Held, that the latter statement, in connection with the facts of the former user of the road, and of its not having been disposed of when F. disposed of the lands on each side thereof, sufficiently shewed the intention to dedicate the short road to the public: that the applicant had therefore another convenient way to his lands, and that the by-law should not be quashed; but, under the circumstances, no costs were given. *Adams and the Corporation of the Township of East Whitby*, 2 O. R., Q. B. D. 473.

See *Rae v. Trim*, 27 Chy. 374. p. 200; *In re Morton and the Corporation of the City of St. Thomas*, 6 A. R. 323, p. 200.

2. *Private Way*.

(a) *By Grant or Necessity*.

Where C., by deed conveyed certain land to S., who owned certain land adjoining the land of C., but not adjoining the land now conveyed, and the deed proceeded—"and I further convey the right of way to cross my land * * * from the highway * * * to the land owned by S., * * * to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of S., his heirs and assigns forever:"—Held, that the right of way was not a mere way

in gross, but became appurtenant to the land of S., generally, and not merely to the land conveyed by the deed. The word "premises" in the deed may cover not merely the land conveyed, but all that goes before in the deed. *Saylor v. Cooper*, 2 O. R., Chy. D. 398.

Where C., conveyed to S., land which was inaccessible from the highway without passing over the lands of C., or some other person:—Held, that a way of necessity was impliedly granted by C., over his land conveyed to S. *Ib.*

Since a way of necessity can only pass with the grant of the soil, the owner of the legal estate in the land as to which it is claimed, should be a party to an action claiming such way, and where an equitable owner of the land sued, he was permitted to make the owner a co-plaintiff by amendment at the hearing. *Ib.*

Held, on appeal that the words employed in the deed were sufficient to pass the interest intended, and that the right of way was thereby made appurtenant to all the lands of S. there situated; not merely to that so conveyed by C. S. C., 8 A. R. 707.

B. and W., becoming entitled in 1830, as tenants in common of 100 acres of land, under a devise, made a partition thereof by agreement, whereby 50 acres were allotted to each in severalty. The 50 acres allotted to B. were land-locked, and there was no way out to the highway, except over the 50 acres of W., over which accordingly B. was allowed by W. to pass at will. In 1840, W. sold to E. the 30 acres of his 50, next adjoining B.'s 50 acres, and also a strip for a road across the other 20 acres. In 1848 E. granted to the then owner of B.'s 50 acres a strip for a road along the north side of his 30 acres, and also the strip along W.'s 20 acres conveyed to him in 1840. This made a change in the course of the way theretofore used by B., and his successors, and was thenceforth the course followed by the latter, and was the right of way in question in this action; but this deed was not registered till 1882. B.'s parcel subsequently became vested in the plaintiff, under conveyances granting not only the land, but also all ways, &c., therewith used and enjoyed. The defendant claimed title to part of W.'s 50 acres by deed made in 1854, without notice, as he alleged, of the deed of 1848. The right of way in question had been used by the plaintiff, and his predecessors in title for over 30 years, prior to the obstruction thereof by the defendant, to restrain which this action was brought:—Held, that the effect of the will and agreement together was the same as if the will itself had devised the one half to B., and the other to W., and the plaintiff had a right of way of necessity over the defendant's land and was entitled to an injunction to restrain the obstruction complained of; and it was not necessary for him to shew any express grant of the right of way by the defendant, or his predecessors in title:—Held, however, that the right of way would have passed under the grant of the land, and all ways, &c., used and enjoyed therewith, as also under a deed of grant drawn according to the Act respecting short forms of conveyances, even if it had not been a way of necessity, and no such words were necessary in order to pass a way of necessity:—Held, also, that the subsequent express grant of a right

of way by the defendant's predecessor in title, did not destroy the right to a way of necessity:—Held, also, that the defendant having notice of an actual travelled way across his land was affected, also, with notice of the origin, as well as the existence of the right:—Held, also, that changing the locality of the way, from time to time, by the agreement of the respective owners, did not destroy the right of way, nor could the grant of a certain specific line for the road put an end to the right, in case a purchaser should buy without notice of the grant:—Held, lastly, that any act of a tenant, without the knowledge or sanction of the landlord, could only affect his interest as tenant, and could not prejudice the reversioner. *Dixon v. Cross*, 4 O. R., Chy. D., 465

Semble, that a way of necessity does not give a right to the owner of the dominant tenement to cross any part of the servient tenement at pleasure, but is confined to a definite way to be determined by the agreement of the parties, or by the owner of the servient tenement, or of the dominant tenement in his default. *Ib.*

II. POWERS AND DUTIES OF MUNICIPAL CORPORATIONS.

1. Opening Roads.

A by-law passed by a municipal corporation cannot have the effect of taking any lands of the Crown in addition to those appropriated by the Crown for the purpose of highways in order to the opening up of the country. *Rae v. Trim*, 27 Chy. 374.

Held, where a by-law has been passed for opening a road over certain land, the municipality is not bound under R. S. O. c. 174, s. 456 to make compensation to the owner before entering on the land. *Harding v. Corporation of the Township of Cardiff*, 2 O. R., Chy. D. 329.

2. Closing Roads.

Held, that the notice of intention to pass a by-law to close a road should state the day on which the municipal council intend considering the by-law. Semble, that the mere fact of the relator having knowledge aliunde was not a sufficient answer to an application by him to quash for want of a proper notice of the day on which the by-law was to be considered. *In re Birdsall and Farrar and The Corporation of the Township of Asphodel*, 45 Q. B. 149.

The power of a municipal council to close up a road, under section 504 of the Municipal Act, whereby any one is excluded from access to his lands, is a conditional one only, and if another convenient road is not already in existence, or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed. The onus of shewing that another convenient road is open to the applicant is upon the corporation. *Adams and The Corporation of the Township of East Whitby*, 2 O. R., Q. B. D., 473.

3. Fencing Ditches.

In driving along a country road the plaintiffs were injured by their horse and buggy falling

into a ditch at the side of the road. It was shewn that the roadway between the ditches was thirty feet wide: that the ditch was of the same character as those along other roads in the county: and that in some places where the ditches are deeper than usual there are guards. There was evidence produced on the part of plaintiffs which, if believed, established facts from which a jury might draw the inference that the ditch, constructed where and as it was, was dangerous, although there was evidence on the part of the defendants to the contrary. The jury found a verdict for the plaintiffs, but the Court of Common Pleas afterwards, upon a rule nisi to enter a nonsuit or for a new trial, granted a nonsuit, holding that the having made a ditch without guards or railings, or without slanting the roadway to the bottom of the ditch so that a person could drive into it without upsetting, was no evidence of neglect on the defendants' part to keep the road in repair. Held, reversing this judgment (30 C. P. 217), that it was a question of fact for the jury, whether, having regard to all the circumstances, the road was in a state reasonably safe and fit for ordinary travel. As the court below had pronounced no opinion as to whether there should be a new trial or not, the appeal was simply allowed, setting aside the nonsuit, but leaving the question of new trial untouched. *Walton et ux. v. Corporation of the County of York*, 6 A. R. 181.

III. ROAD COMPANIES.

The provisions of the "General Road Companies' Act" (R. S. O. c. 152), respecting the extension of roads, apply to roads which have been constructed and completed, and tolls established thereon. In this case the extensions were new constructions within the city of Hamilton, and, measured separately, were less than two miles, though the distance of the original road and the extensions together much exceeded two miles:—Held, that the defendants were entitled to exact tolls therefor. The toll gate had been maintained for nearly nine years on the portions of the road within the city of Hamilton:—Held, that this did not preclude defendants from erecting a gate and taking toll there. *Knott v. The Hamilton and Flamborough Road Company*, 45 Q. B. 336.

Under "The General Road Companies Act," R. S. O. c. 152, ss. 102, 104, 109, the first engineer appointed to examine a road alleged to be out of repair, must act throughout the proceeding unless another is appointed under sec. 109; but under that section the judge is the person to be satisfied that the first engineer is unable to make or complete the examination, and his decision on that point cannot be reviewed. The engineer appointed under the Act need possess no official certificate or degree. The second engineer having been appointed in January to examine and report "as to the present condition of the road" made an examination and so certified, but was unable to report whether the repairs directed by the previous engineer had been performed, as it was covered with snow. In May following, without any further authority, he again examined and certified that it was in good repair, and the company began again to take tolls:—Held, that he was *functus officio* after the first

examination, and that the tolls therefore were illegally imposed. *Regina v. Greaves*, 46 Q. B. 200.

IV. REPAIRING.

1. Appropriating Material.

Pursuant to a by-law of the town of Ingersoll, permitting that municipality to take gravel from C.'s land for repairing their streets, without mentioning the quantity, the award was made that the corporation should "pay C. 32½ cents for every load of gravel or stone they should take for the repairs of their roads, as and for compensation for the injury done, and that the right to take such gravel at this price should extend for five years":—Held, that the by-law should have defined the quantity of gravel required to be taken, and the award should have fixed the value of such quantity as well as the amount to be paid for the right of entry to take the same away, and therefore that the award was bad. *In re the Corporation of the Town of Ingersoll and Carroll*, 1 O. R., Q. B. D. 488.

2. Liability of Municipality for Negligence.

A portion of a highway which the defendants were bound to keep in repair had a trench running across it caused by water escaping from a culvert, and was allowed so to continue out of repair for a month. The deceased while lawfully travelling along the road which he had passed over the day before, attempted to cross such trench in a waggon, from which he was thrown and killed. In an action for damages, it was alleged by the defendants that deceased was well aware of the defect in the road, if any, and at the time of the accident was intoxicated, and thus contributed to the accident. It was left to the jury to say whether the deceased had so contributed to the accident, that but for want of reasonable care it would not have occurred. The jury answered this in the negative, and rendered a verdict in favour of the plaintiff:—Held (affirming the decision of the Court of Queen's Bench, who refused a rule nisi to enter a nonsuit), that the question of contributory negligence was one for the jury, and could not have been withdrawn from them. *Maw v. Townships of King and Albion*, 8 A. R. 248.

See *Walton et ux. v. The Corporation of the County of York*, 6 A. R. 181, p. 789.

V. OBSTRUCTION OF PUBLIC AND PRIVATE WAYS.

1. Generally.

Held, (Armour, J., dissenting) that the Ontario Act (R. S. O. c. 108) reducing the period of limitation to ten years, does not apply to the interruption of an easement, such as a right to a way in alieno solo, in this case a lane, which the defendant had occupied and obstructed for ten years, but which the plaintiff had used prior to such obstruction. *Mykel v. Doyle*, 45 Q. B. 65.

An arrangement made between the plaintiff and B., whereby the latter "was allowed to go through" the plaintiff's land, was superseded by an arrangement whereby, in consideration of 150 cords of wood and the making of a road by B.,

the latter was to have a right of way through the same land. The plaintiff was to erect and keep up the gate at one end, and B. was to keep up the gate at the other end of the road. The wood was delivered, and the road made, according to the terms of the agreement. The plaintiff subsequently erected three additional gates along the course of the right of way, which were not necessary for the enjoyment of the land. The bill was filed to restrain the defendant from using the way except upon the terms of shutting those three gates when going through:—Held, reversing the decree of Spragge, C., that the right of way having been purchased when there were but two gates, the plaintiff had no right to fetter the enjoyment of the way by adding additional gates. *Kastner v. Beadle*, 29 Chy. 266.

See *Standly et al. v. Perry et al.*, 3 S. C. R. 356, p. 781.

VI. SIDEWALKS.

The defendants were the owners of a building on the street. A pipe, connected with the eave troughs, conducted the water from the roof down the side of the building, and by means of a spout discharged it upon the sidewalk, where in the winter it was formed into a ridge of ice, upon which the female plaintiff slipped and fell while walking on the street and injured herself. The jury found that the defendants did not know of the accumulation of ice, and that they ought not reasonably to have known of it:—Held, *Armour*, dissenting, that the defendants were not liable. Per *Hagarty, C. J.* The carrying of the water to the sidewalk was a harmless act; the action of the weather was the proximate cause of the accident, and the defendants not having knowingly allowed ice to accumulate were not responsible. Per *Armour, J.* The conducting of the water to the sidewalk was a wrongful act, of which the formation of ice on the sidewalk in winter was the natural certain and well known result, and the defendants were responsible for the accident. *Skelton et ux. v. Thompson*, 3 O. R., Q. B. D. 11.

VII. BRIDGES.

1. Generally.

The township of Gloucester and the city of Ottawa, which was part of the township of Nepean, are on the easterly and westerly sides respectively of the river Rideau, and both within the county of Carleton. In the river at this point is situate Cumming's Island, and a bridge extended from the Ottawa side to the Island, and from the opposite side of the Island to the Gloucester shore. A line drawn down the middle of the river equidistant from the banks, without regard to any islands, would leave the greater part of Cumming's Island on the Gloucester side, but the channel between the Island and Gloucester is the most navigable, while the largest amount of water passes through the other channel:—Held, that a line so drawn properly ascertained the limit between the adjoining municipalities, for the words "middle of the main channel," used in 14 & 15 Vict. c. 5, s. 11, and R. S. O. c. 5, s. 10, have their common law signification of the middle of the stream, and therefore the Island formed part of the township

of Gloucester, and that part of the bridge from the Island to the latter township was wholly within that township. Per *Armour, J.*—If this be not the true construction, then, as the Legislature were dealing with territorial and proprietary rights, and not with navigation, the words "main channel" mean the widest and not the deepest or most navigable channel, in which case also the Island would be wholly within Gloucester. The county was found guilty on an indictment for not keeping the bridge in repair, which had been removed into this court, but the indictment described the bridge as being in the townships of Gloucester and Nepean:—Held, that by 12 Vict. c. 81, s. 201, schedule B 4, the easterly limit of Ottawa is the middle of the river, and is coincident with the westerly limits of Gloucester, and that no part of the township of Nepean lies between Ottawa and the river; and the bridge was therefore wrongly described as being in the two townships:—Held, also, that though this could have been amended at the trial, it could not be amended on this motion, and a new trial was ordered. Per *Cameron, J.* The situation of the island in the river should not affect the liability of the municipality, for the bridge was evidently a county work, being intended to span the whole river and form a way from one bank to the other, the island, which was out of the direct course that the bridge would otherwise have taken, being merely used for engineering purposes:—Held, also, that under R. S. O. c. 174, s. 495, the duty of maintaining the bridge was cast upon the city and county. *Regina v. The Corporation of the County of Carleton*, 1 O. R., Q. B. D. 277.

VIII. TOLLS.

The plaintiff, a stage driver, was in the habit of driving passengers over that part of the road of a company incorporated under C. S. U. C. c. 49, and previous Acts, from T. to the terminus of a street railway laid down on the line of the road, being between two principal gates on the road, a distance of nearly three miles, thus using many miles of the road daily. The defendant who was the lessee and manager of the road, erected a check gate across the road at a point within the space travelled by the plaintiff, and then enforced payment of a toll of five cents each way from the plaintiff, giving a ticket to pass through the principal gate beyond:—Held, that such check gate was legally erected, and the toll was legally demanded; and that the fact that the plaintiff did not intend to pass through a principal gate could make no difference. The road company consisted of four persons, of whom F. and another personally signed an authority to the defendant to erect the gate, and F. signed for the other two under powers of attorney for the management of their affairs, but not specially referring to this road. After action commenced these two ratified F.'s act by endorsement on the back of the authority:—Held, sufficient. *Panderlip v. Smyth*, 32 C. P. 60.

Held, that the plaintiffs had the power to demise to the defendant the right to collect the tolls upon one of the township roads; that such right should be exercised under a general or special by-law authorizing it; but that this objection was not open to the defendants, the

lessee and his sureties, the former having enjoyed the benefit of the demise during the whole term. The toll-gate was beyond the limits of the plaintiffs' municipality upon the Barton side of the road, Barton and Ancaster being adjoining townships:—Held, that an objection to the plaintiffs' right to collect tolls thereat could not be maintained, for the plaintiffs might have the title thereto under the General Road Companies Act, R. S. O. c. 152, s. 63; and there was nothing to shew that the whole road allowance between the two townships was not part of and vested in the plaintiffs; also, under R. S. O. c. 174, ss. 498, 499, there might have been a by-law of the adjoining municipality giving the plaintiffs the right to erect such toll-gate; and even without such by-law the plaintiffs' encroachment may have been acquiesced in. *The Corporation of the Township of Ancaster v. Durrand et al*, 32 C. P. 563.

See *Canada Southern R. W. Co. v. The International Bridge Co.*, 8 App. Cas. 723; 7 A. R. 226; 28 Chy. 114, p. 387.

See also Sub-head III, p. 789.

IX. TREES.

Held, that the owner of land adjoining a highway has, under R. S. O. c. 187, such a special property in the shade and ornamental trees growing on such highway opposite to his land as to entitle him to maintain an action against a wrongdoer to recover damages for the cutting down or destroying such trees; and he is not restricted to the penalty given by sec. 5:—Held, also, that the Act refers to trees of natural growth as well as to those planted. In this case the damage consisted in the cutting down of some ten or twelve of the trees, for which the plaintiff was awarded \$150:—Held, not excessive. *Douglas v. Fox et al.*, 31 C. P. 140.

[See 47 Vict., c. 36, s. 1 Ont.]

X. TRACTION ENGINES.

See *The Corporation of the County of York v. The Toronto Gravel Road and Concrete Co.*, 3 O. R. 584, p. 129.

XI. QUEBEC TURNPIKE TRUST.

See *The Queen v. Belleau*, 7 App. Cas. 473, reversing 7 S. C. R. 53, p. 121.

WELLAND CANAL.

Compensation for lands taken. See *In re The Welland Canal Enlargement—Fitch v. McRae*, 29 Chy. 139, p. 113.

WHARF.

See *Standly et al. v. Perry et al.*, 3 S. C. R. 356, p. 781.

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See HUSBAND AND WIFE.

WILD LANDS.

Title by possession to wild land can be made out otherwise than by actual enclosure. See *Steers v. Shaw et al.*, 1 O. R. 26, p. 431.

WILL.

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VII. DONATIO MORTIS CAUSA.—See GIFT.

I. COMPETENCY OF TESTATOR.

The testator, a man of education, had become so weakened by illness as to be confined to his bed for some time prior to his death, and a day or two before that occurred executed a will, by affixing what was intended as his mark thereto, the instructions for which were obtained by the person preparing it by putting questions to the testator as to the disposition of his different properties, such will when drawn having been read over to the testator clause by clause, who expressed his assent to some of them while as to others he made intelligent remarks and some changes in the provisions thereof. The Court [Blake, V. C.,] in a suit brought to impeach the will as having been obtained by fraudulent practices and undue influence of persons benefited thereunder, as well as by the persons concerned in the preparation of the will, refused the relief sought, and dismissed the bill, with costs to be paid out of the residuary estate; although it was shewn that though notice had been given to the testator, he was wholly unprepared to make the will when he came to the act—that there was no intention on his part to make a will—that he was a man who, when in possession of his mental faculties, was not likely to take suggestions from others—that not a single devise originated with the deceased—that the author of the will did not know what property the deceased had—that he admitted that if he had had this knowledge he would have spoken to him seriously on the subject of his relations, of whom there were several—that the will was inofficious—that the testator was 84—that it took two hours to prepare the will, although it covered but one foolscap sheet—and that they sent for and obtained the numbers of the lots from a neighbour, thus shewing that they could not obtain the information from the deceased. *Thomson v. Torrance et al.*, 28 Chy. 253. Affirmed 9 A. R. 1.

See *Bell v. Lee*, 8 A. R. 185, p. 813

II. AGREEMENTS TO BEQUEATH PROPERTY.

The testator, father of the plaintiff's wife, suggested to him to purchase a lot of land which was

subject to a mortgage, saying that if he would do so, and have the property conveyed to his (plaintiff's) wife he would pay off the incumbrance. The plaintiff in consequence made the purchase, and had the property conveyed as suggested, but the testator refused to pay the instalments on the mortgage and the plaintiff was compelled to pay it off himself. The testator subsequently expressed his regret at having thus acted, and promised the plaintiff that he would do better for them; that he would pay plaintiff \$150 a year for ten years, and bequeath to his wife \$1,000. By the will, however, only \$100 was left to her, and the plaintiff instituted the present suit against the representative of his father-in-law to enforce such second agreement, or for payment of damages by reason of the breach thereof. The only direct evidence was that of the plaintiff. At the hearing there were produced two receipts signed by the daughter for \$260 and \$200, respectively, expressed to be on account of money left her by her father's will; and witnesses swore that the testator had told them that he had agreed to pay for the place if the plaintiff would take out the deed in his wife's name, and that he was making the payments as the plaintiff had so taken the deed:—Held, that there was sufficient corroboration of the evidence of the plaintiff as required by (R. S. O. c. 62), and that the second agreement or promise by the testator was not voluntary, the former promise, even if barred by the statute, being a sufficient consideration, as well as the conveyance to the daughter made in pursuance of it; and a decree was made for payment of the legacy of \$1,000, less the two sums of \$260 and \$200, with interest from one year after the death of the testator on the balance. *Halleran v. Moon*, 28 Chy. 319.

See *Roberts v. Hall*, 1 O. R. 338 p. 338.

III. CONSTRUCTION AND INTERPRETATION OF WILLS.

1. *Generally.*

It is a principle of construction that the same meaning shall, as far as possible, be given to the same words in the same will. *Boys' Home of the City of Hamilton v. Lewis et al.*, 4 O. R., Chy. D. 18.

2. *After Acquired Property.*

The testator owned eighty acres of land, and sold a part thereof; subsequently, and on the 30th March, 1875, he made his will, whereby he devised to his son N. the said eighty acres, "excepting so much thereof as I may have sold and conveyed." Thereafter, and shortly before his death, he again acquired the part which he had sold:—Held, that although the will spoke from his death, the after-acquired property did not pass, for the testator had specified the subject matter of his devise, within which the property in question was not included. *Vanstickle et al. v. Vanstickle et al.*, 1 O. R., Chy. D. 107. Reversed on appeal, 9 A. R. 352.

3. *Particular Words and Expressions.*

"Dying without heirs." See *Tyrwhitt v. Dawson*, 23 Chy. 112, p. 798.

"Heirs." See *Scott et al. v. Gohn et al.*, 4 O. R. 457, p. 811.

"In case of death of my children." See *Dumble v. Dumble*, 8 A. R. 476, p. 805.

"Worldly estate." See *Town v Borden*, 1 O. R. 327, p. 803.

4. Period of Distribution.

See *Tyrwhitt v. Dewson*, 28 Chy. 112, p. 798; *Anderson v. Bell*, 8 A. R. 531, p. 804.

5. Misdescription in Will.

See *Re Callaghan*, 8 P. R. 474, p. 667; *Holtby v. Wilkinson*, 23 Chy. 550, p. 799.

6. Estate or Interest Taken.

(a) Estate Tail.

A testator, amongst other devises and bequests, devised as follows:—"Secondly, I bequeath to my son, Robert Little, eighty-six acres of land (describing them), also one span of horses and one-half of my farming utensils: he is nevertheless subject to pay the sum of £112 10s. to my daughters, as hereinafter provided, the sum of £18 15s., to be paid annually, the first instalment to be made one year after my decease, until the whole is paid." He next devised to his son John fifty acres of land, together with one span of horses and one-half of his farming utensils, subject also to a charge of £112 10s. for his daughters. He then made several bequests in favour of his daughters and wife; and if his unmarried daughters should die before their legacies were paid, John and Robert were to divide the unpaid sums equally between them. He then provided as follows: "Should either of my two sons Robert and John die without issue, I wish that their shares should be divided equally among my surviving children."—Held, that the sons took an estate tail, and not a fee simple subject to an executory devise over. *Little v. Billings*, 27 Chy. 353.

A devise was to A. C. M. for life with remainder to her husband W. M. "and the heirs of their bodies for ever."—Held, that W. M. took an estate tail. By a subsequent clause the will provided that, in the event of the said W. M. dying without making a will, the property should be divided among his surviving children in certain shares, but declared it to be the intention of the testatrix that he should have full powers, with the consent of his wife, to sell and convey absolutely any part or portion thereof; "and in case of his making a disposition by will to vary the shares and proportions thereof as he may deem best"—Held, that the powers so given to W. M. to vary the shares or proportions of the heirs-in-tail, did not affect the quality of the estate devised. *Fleming v. McDougall*, 27 Chy. 459.

By his will and codicil a testator devised to his son J. on the death of his mother, certain land in consideration for which he was to pay the sum of £150 to the executors in four years. In the event of his dying without heirs the land was to be sold and the amount received therefor over and above £150 "to be equally divided

amongst my surviving children":—Held, (1) that J. took a fee-tail in remainder after an implied life-estate in favour of the mother, as the "dying without heirs" must be taken to mean heirs of the body, not heirs general, he having brothers and sisters still living. J. died during the lifetime of his mother. Held, (2) that the period of division should be the death of the tenant for life, and the survivors at the time of such death were to take the whole amount realized by the sale of the lands upon which, however, the £150 was to form a charge. *Tyrwhitt v. Dewson*, 23 Chy. 112.

The testator directed all his lands to be sold by public auction or private sale on his youngest surviving child attaining 21, and the proceeds to be divided amongst nine of his children, share and share alike; but in the event of either of the nine children dying without issue before the youngest surviving child should attain twenty-one, the share of the one so dying should go to the survivors:—Held, that these words did not create an estate tail or quasi entail—and that the shares of the legatees were vested. *Scott v. Duncan*, 29 Chy. 496.

(b) Life Estate.

A. devised land to his executors, "to hold the same in trust for the use and benefit of my son W. during his lifetime, and after the death of my son W. in trust for his heirs, issue of his body, until the youngest of said heirs shall become of age, and then to convey it to said heirs, the children of my said son W. taking equal shares, and the child or children of any deceased child of my said son to take their parent's share in equal proportion":—Held, that W. took only an estate for life, and that the legal estate in remainder vested in the trustees for the benefit of his heirs. *In re Romanes and Smith*, 8 P. R. 323.—Proudfoot.

A will directed an executor to pay A. for life "the interest, dividends, and profits of certain stock, and of the moneys into which the said stock might be changed." Subsequently new stock was issued at par and 18 shares allotted to the executor. Not being accepted, these new shares were sold and produced a premium of \$226.67, which was credited to the executor:—Held, that the premium was principal, and that A. was entitled only to the interest on it during her life. *Re Smith*, 8 P. R. 384.—Proudfoot.

After directing a sale and division of the proceeds of an estate, the will as to one of the legatees, M. S., "provided that the said M. S.'s interest in my estate should not be transferable or transferred to any other person whatsoever, but may be inherited by her children, legitimate; and in case the said M. S. die without legitimate issue, then her interest in my estate shall revert back to the other legatees," &c.:—Held, that M. S. took only a life estate. *Jeffrey v. Scott*, 27 Chy. 314.

A testator bequeathed to his two daughters (both of whom were married and had children at the time of his will) the sum of \$1,000 each, charged upon his realty, which he devised; such sums to be invested in bank stock, and the interest accruing thereon to be paid to his daughters during their natural lives, and after their decease

directed these sums to be equally divided amongst their heirs. By a codicil, the testator directed that, should his real estate be sold, the \$2,000 might remain on mortgage at interest, payable half yearly to the daughters, and when the mortgage should be paid, his executors were to have full power to invest that sum in homesteads for his daughters, should they desire to do so:—Held, that the daughters took a life estate, with remainders to their heirs as purchasers. *Rogers v. Louthian*, 27 Chy. 559.

A testator devised certain real estate "to be owned, possessed, and inherited by my wife during her natural life subject to the further provisions of my will," followed by a devise to "W. G. when he is of the age of twenty-three years, 200 acres, or if sold before he arrives at the years mentioned, that some other lot of land or money amounting in value to the above mentioned lot be given him in lieu thereof:—Held, that the wife took a life estate with a vested remainder over to W. G., and the testator having shortly before the date of his will contracted for the sale of the land so devised, that the estate of W. G., who died during the life of the widow, and before he had attained twenty-three, was entitled to the proceeds of such sale:—Held, also, that "200 acres of land, the west half of lot No. 14," was falsa demonstratio of the west half, the testator having referred to the whole lot as being 200 acres in a subsequent part of the will. *Holtby v. Wilkinson*, 28 Chy. 550.

A testator devised certain lands as follows: "I will, devise, and bequeath unto my wife for and during her natural life all that parcel of land (describing it) * * I also will and bequeath unto her, my beloved wife, everything, real and personal, within and without; and it is hereby understood that the property above described shall be under the control of my said beloved wife. After the demise of my wife it is my will and pleasure that the aforesaid real estate shall descend to my nephew and his heirs." The testator had no other real estate than the said lands, and there was nothing else to which his language, importing that his wife was to have control of everything, real and personal, could be referred:—Held, nevertheless, that the intermediate clause had no effect on the life estate expressly given to the wife, and there was nothing to change or enlarge the usual character of such life estate, so as to render her punishable for waste. *White v. Briggs*, 15 Sim. 17, S. C. in appeal, 2 Phil. 583, distinguished. *Clow v. Clow*, 4 O. R., Chy. D. 355.

See also *Tyrwhitt v. Dewson*, 28 Chy. 112, p. 798; *McGarry v. Thompson*, 29 Chy. 287, p. 806; *Dumble v. Dumble*, 8 A. R. 476, p. 805.

(c) Joint Tenants and Tenants in Common.

By will J. H. A. directed:—"Until the expiration of four years from the time of my decease, and until the division of my estate as hereinafter directed, my executors shall every year place to the credit of each of my children the sum of sixteen hundred dollars, and if any of my children shall have died, leaving issue, then a like sum to and among the issue of the child so dying, such sum of sixteen hundred dollars to be paid by half yearly instalments to such of my children as shall be of age or be married; but if any advances shall have been made to any of them, and

interest shall be due thereon, such interest to be deducted from the said sum of sixteen hundred dollars. As regards the division, appropriation, and ultimate disposition of my estate, it is my will that, subject to the payment of my just debts and legacies, bequests and annuities, I have heretofore given or may hereafter give, and to the expenses of the management of my estate, all the rest, residue and remainder of my estate, and the interest, increase, and accumulation thereof, be distributed, settled, paid and disposed of, to and among my children who may be alive at the time of the division and appropriation into shares of my estate hereinafter directed, and the issue then living of such of my children as may be then dead, at the time and in the manner following, that is to say: That immediately, on the expiration of four years from my death, my executors, after making such provision as may be necessary for the payment of any debts and legacies that may be outstanding and unpaid, and of outstanding annuities, and of the expense of the management of my estate, shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children, and of my children who shall before them have died, having lawful issue then surviving, shall amount unto, and shall apportion and set off one such share to each of my said then surviving children, and one such share to the lawful issue of each of my then deceased children, whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child. And it is my will, and I direct, that from henceforth a separate account shall be kept by my trustees of each share, and of the interest and profit thereof, and the payments made to or on account of or for the maintenance and education of each of my said children or issue, shall be charged against the share apportioned to such child or children, or wherein such issue shall be interested, so that all accumulations and profits that may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue—it being my intention that after such division shall take place, the maintenance, education, and support of each of my children while under the age of twenty-one years shall be drawn from the separate income of such child, and the maintenance and education of the children of any of my children who may have before them died, leaving issue, shall be drawn from the share or shares set apart for the issue of such deceased child or children. And that my children, and such issue of deceased children being of age, that is to say, of the age of twenty-one years, or when respectively they shall attain the age of twenty-one years shall be severally entitled to receive for their own use the whole of the interests and profits of the share and proportion of my estate to which they may be respectively entitled." On 26th May, 1864, M. L. A., testator's daughter, married C. H. F., appellant. Testator died 24th December, 1870. On 25th August, 1872, testator's daughter died, leaving three children, H. A. F., E. B. F., and W. S. F. On the 14th September, 1877, H. A. F., the eldest son of appellant and M. L. A., died. Thereupon the appellant claimed that the three brothers took the mother's share under the will as tenants in common and, the property being personal property, H. A. F.'s share vested in the appellant's father:—Held, that the inten-

tion of the testator was that his estate should be divided, and that the children of testator's daughter took as tenants in common, and consequently on the death of the eldest son the whole right, title and interest in his share, vested in the appellant. *Fisher v. Anderson et al.*, 4 S. C. R. 406.

A testator directed that, at the death of his wife, if she survived him, all his estate (with certain exceptions) should be sold, and the proceeds equally divided among his four daughters and three sons and their children, after paying \$200 to each of the three children of his deceased daughter R. He left surviving him his widow, who was still living, three sons and four daughters and twenty-seven grandchildren, besides the children of R. Two of the grandchildren were born after the date of the will but before the testator's death, and one was born after his death:—Held, that all the children and grandchildren would take concurrently who were in existence at the death of the widow; but as other grandchildren might still come into being who would not be bound by the present proceedings, the court declined to make any order upon the will. *Dryden v. Woods*, 29 Chy. 43C.

(d) *Vested or Contingent.*

The testator gave £1,500 by will to his widow, and in the event of her marrying again or dying intestate, this sum was at her death to be divided share and share alike among "my heirs (my brothers' children)." The widow did marry again, and a daughter of W., a brother of the testator, died after marriage but before the death of the widow, and so before the time for distribution:—Held, that the rule in such a case is, that a bequest in the form of a direction to pay, or to pay and divide at a future period, vests immediately if the payment be postponed for the convenience of the estate, or to let in some other interest; that the intention here was to let in the life estate of the widow, and that this was a share vested in the deceased child of W., which passed to her representatives. *Webster v. Leys*, 28 Chy. 475.

A will contained a devise in trust for the support and maintenance of the testator's widow during her life or widowhood, with a direction that she should have the full right to possess, occupy, and direct the management of the property; and at her death or second marriage. "my son Thomas, if he be then living, shall have and take lot one, which I hereby devise to him." Thomas died before his mother:—Held, that he took a vested remainder in lot one. *Keefer v. McKay*, 29 Chy. 162. Affirmed, 9 A. R. 117.

The will further contained a devise of lots two, &c., to the testator's sons, Alexander, John, Charles and Thomas, their heirs and assigns, as tenants in common, and a direction that the same should take effect from and after the death or second marriage of the testator's widow. There was a proviso that if any child died without issue before coming into possession of his share, the same should go to the survivors. An indenture was executed between the parties, conveying all the estate, &c., of those interested to Alexander, John, Charles, and Thomas, after the execution

of which Alexander and Charles died. An Act of Parliament was subsequently passed confirming this indenture, and declaring that it should take effect from its date, and not be affected by the subsequent death of any of the testator's children; and it confirmed the estate in John and Thomas as tenants in common, subject to the life estate of their mother; with the right of survivorship between them in case of one dying before the other without issue, before the death or marriage of their mother. After this, and in his mother's lifetime, Thomas died, having, however, survived his brother John, who died without issue:—Held, that Thomas took a vested remainder in fee expectant upon the determination of his mother's life estate. *Id.*

The residue of the estate was directed to be converted, and to be at the disposal of the widow for her life, while she remained unmarried, and thereafter to the children. This was subject to a proviso as to coming into possession:—Held, that the children took vested interests in the fund, subject to be divested on the happening of the contingency mentioned. *Id.*

A testator by his will gave his homestead and certain personalty to his wife, while unmarried, for the maintenance and support of the family surviving him, until the members of his said family should respectively attain twenty-one, and afterwards for the maintenance of his wife for life. He then proceeded to give and bequeath all his other real and personal estate, not thereinbefore mentioned, to his executors in trust to dispose of and invest, and "upon my son Thomas attaining the age of twenty-one years, should he be my only child, in trust to pay to him and put him in possession of the said residue;" but if there were more children, he directed that it should be divided amongst all, in the proportion of one part to a daughter and two parts to a son, to be paid to them when they should respectively attain twenty-one. He then proceeded to devise to his son Thomas the homestead, together with the household goods, &c., on the decease or second marriage of his said wife, should he have attained his twenty-first year. And in case his son Thomas should not survive him, or attain the age of twenty-one, or in case he (the testator) should have no other surviving child who should attain the age of twenty-one, or in case he should have no grandchild, his real and personal estate was to be divided in certain proportions among his brothers and sisters. Thomas, the only child surviving the testator, attained twenty-two, and died without issue, leaving him surviving his mother who had not married again:—Held, Thomas took a vested estate, for that it did not appear that the testator intended it to be contingent either on his attaining twenty-one, or surviving his mother:—Held, also, the testator's intention was, that the gift over should not take effect unless Thomas died under twenty-one, without leaving a child. *Gairdner v. Gairdner*, 1 O. R., Chy. D. 184.

A testator, by his will, "as touching his worldly estate," gave to his wife the use of all his personal property and of his farm and buildings for her support and the bringing up of his children,—"and at her decease the whole of the personal and real property to be equally divided between my six children:—Held, that the shares of the children vested on the death of the

testator. *Baird v. Baird*, 26 Chy., 367, explained and reconciled:—Held, also, “worldly estate” includes not only the corpus of the testator’s property, but the whole of his interest therein. *Town v. Borden*, 1 O. R., Chy. D. 327.

A testator, by his will, directed his trustees to accumulate certain trust moneys arising from the sale of his real and personal estate, and to hold them after the death or second marriage of his wife, and his youngest child attaining majority, in trust for his sons and daughters in equal shares as tenants in common; and in the event of any of his said children dying leaving issue, he directed that the share of the one, so dying, should be divided among such issue, so soon as such issue should have attained majority; and in default of any such issue of his said children attaining majority, he devised the whole estate, real and personal, to his trustees, to be converted into money, and applied to founding a charitable institution:—Held, on a view of the whole scope of the will, the period of absolute vesting was postponed until the grand-children attained majority, failing which the devise to the charity took effect. *Rule in O’Mahoney v. Burdett*, L. R. 7 H. L. 388, and *Ingram v. Soutten*, *ib.* 408, applied. *Re Charles—Fulton v. Whatmough*, 1 O. R., Chy. D. 362. Reversed on appeal.

See *Holtby v. Wilkinson*, 28 Chy. 550, p. 799; *Scott v. Duncan*, 29 Chy. 496, p. 798.

(e) *Vested Liable to be Divested.*

The testator expressed a desire “to have retained for my children my property on Yonge street; and for this purpose I desire that the proceeds of my life insurance be applied in the purchase for my daughters’ benefit of the incumbrances, I desire that all my other lands be sold. * * I desire that the proceeds of my estate and rents of my Yonge street property be applied * * in the support, maintenance, and education of my two daughters, and in paying the incumbrances on the Yonge street property. After paying the necessary charges, my wish is, that the interest of my estate be applied by my trustees in the support of my children. Should one of my said two daughters die, or become a Roman Catholic, her share to go to the other, and should both die without issue, or become Roman Catholics, then my estate is to go to my sister L. and her heirs. * * I direct that my trustees shall divide the proceeds of my estate equally between my two daughters, allowing each, during their minority, or until the marriage of one or other of them, a sum sufficient to maintain and educate them, and after they come of age an equal share of all proceeds to be secured and paid them, free from all control of any husband or any other person.” There were only these two daughters, children of the testator, and both attained the age of twenty-one years without either having become a Roman Catholic:—Held, that the interests taken by the daughters were vested, though subject to be divested upon the happening of the events mentioned before twenty-one; and that at that time the shares vested absolutely in them: so that L. took nothing under the will. *Griffith v. Griffith*, 29 Chy. 145.

See *Keefer v. McKay*, 29 Chy. 162, p. 802.

(f) *Taking per Stirpes or per Capita.*

A testator disposed of the residue of his estate as follows: “I give and bequeath the remainder of my personal and real estate to my legal heirs, including my daughter *Jemima Woodside*, to be divided equally amongst them.” He left three children and four grandchildren, the issue of two other of his children, who predeceased him:—Held, that a division per capita (not per stirpes) was proper. *Chadbourne v. Chadbourne*, 9 P. R. 317.—Boyd.

The testator bequeathed his residuary estate, all other property, in lands, mortgages, and stocks, to his grandchildren, “the children of J. C., and of my daughter, A. J. B., wife of D. B., share and share alike, on their coming of the age of twenty-five years, to be finally determined and paid to them on the youngest coming to the age of twenty-five years. Provided, nevertheless, that each one on coming to the age of twenty-five years receive a portion of not more than half what their share will be on the youngest coming of age.” (Then directions were given as to keeping books of account, and managing the estate.) “And when the books so audited shew the revenue of my estate, after paying the before mentioned bequests, taxes and other charges on the same, amounts to £500, then half of such revenue or income be divided, share and share alike, between the families of my son, J. C., and the family of my daughter, A. J. B.” (The other half going into the estate):—Held, affirming the judgment of the Court below, 29 Chy. 452, that the children referred to, the grandchildren of the testator, took per capita, and not per stirpes. *Anderson v. Bell*, 8 A. R. 531.

(g) *Executory Devise.*

See *Little v. Billings*, 27 Chy. 353, p. 797.

(h) *Bequests of Personality.*

A testator, who died in February, 1869, by his will, amongst other things, gave legacies payable in eight and thirteen years, and devised lot 8 to his son R., and lot 9 to his son D., subject to charges, the devisees to get possession thereof when his youngest child attained twenty-one. At that time D. and R. were to get one half of the stock and implements which would then be on the said lots, the other half to be divided amongst other legatees. The youngest child had not yet attained twenty-one. The Master at Hamilton directed an account to be brought in of the stock and implements at the time of the reference on said lots, being the proceeds of the old stock left thereon by the testator, and also those subsequently procured from the produce of the said lots; and also an account of the stock or implements left by the testator which still remained on the land. The defendants appealed on the ground that if any further account was to be furnished, it should be only of stock and implements purchased with the proceeds of the sale, or obtained by the exchange of the stock or implements left by the testator; which appeal was dismissed, with costs. *Davidson v. Oliver*, 29 Chy. 433.

Testator by his will gave all his property real and personal, to trustees, directing that his wife

should receive all rents and interest during widowhood, and until his youngest child should come of age: that in case of her death or marriage before the youngest child came of age, his property should be divided equally among his children on their respectively coming of age, and in case all his children should die under age without issue, their portions should be divided equally among his brothers and sisters. A letter was found among his papers, addressed to his wife, saying that he had made two wills, "one before I was married, which is to be considered void, but the other I wish to modify, as it was written in a hurry. I wish my dear wife and our children to have all my property, to be divided equally, my wife to have the use of the whole until the children are of age. In case of death of my children my wife to have the use of the property in her lifetime, and then to go to my brothers and sisters." The testator left two children, who both died under age unmarried, their mother surviving them:—Held, reversing the judgment of the Court below, (29 Chy. 274,) that the will and letter must be read together, and the will must stand except so far as "modified;" that the "death of my children" referred to their death under age without issue before his wife; and therefore that she took the personalty (which alone could be affected by the letter) for life, and after her death it would go to testator's brothers and sisters. *Dumble v. Dumble*, 8 A. R. 476.

7. Remainders.

See *Rogers v. Lowthian*, 27 Chy. 559, p. 799; *Tyrwhitt v. Dewson*, 28 Chy. 112, p. 798; *Holtby v. Wilkinson*, 28 Chy. 550, p. 799.

8. Conversion.

A testator devised all his real and personal estate, to trustees to sell the realty and get in the personalty, the proceeds of which, after payment of debts, they were to invest in their names upon trust to pay the annual income to his two sons in equal moieties, they maintaining their mother during life; and after the death of each of the sons the trustees to hold one moiety of the trust moneys upon trust to pay and divide and transfer the same equally between and amongst such of his children as should be living at his decease, and the issue then living of such children as should be then dead, as tenants in common in a course of distribution, according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take, by way of substitution, amongst them, the share or respective shares only, which the deceased parent or parents would, if living, have taken:—Held, that the widow was not put to her election, but was entitled to dower as well as the provision made for her by the will; and it being alleged that the sons had not provided for her maintenance, a declaration was made that she was entitled to such maintenance, and a reference was directed to find what would be a proper sum for that purpose, that a complete conversion had been effected by the trust for sale in the will, so that the interests of the sons should be ascertained as if the will consisted of personal estate only; and that the sons took life estates therein only; and one of the sons having

died without children that there was an intestacy as to his share, subject however, to a proportion of the charge for the maintenance of the widow. *McGarry v. Thompson*, 29 Chy. 287.

9. Residuary Estate.

Among other bequests the testator declared as follows:—"I bequeath to the Worn-out Preachers' and Widows' Fund in connection with the Wesleyan Conference here, the sum of £1,250, to be paid out of the moneys due me by Robert Chestnut, of Fredericton. I bequeath to the Bible Society £150. I bequeath to the Wesleyan Missionary Society in connection with the Conference the sum of £1,500." Then follow other and numerous bequests. The last clause of the will is:—"Should there be any surplus or deficiency, a pro rata addition or deduction, as may be, to be made to the following bequests, namely, the Worn-out Preachers' and Widows' Fund; Wesleyan Missionary Society; Bible Society." When the estate came to be wound up, it was found that there was a very large surplus of personal estate, after paying all annuities and bequests. This surplus was claimed, on the one hand, under the will, by these charitable institutions, and on the other hand by the heirs-at-law and next of kin of the testator, as being residuary estate, undisposed of under his will:—Held, affirming the judgment of the Supreme Court of New Brunswick, that the "surplus" had reference to the testator's personal estate out of which the annuities and legacies were payable; and therefore a pro rata addition should be made to the three above-named bequests, Statutes of Mortmain not being in force in New Brunswick. [Fournier and Henry, JJ., dissenting.] *Ray et al. v. The Annual Conference of New Brunswick, &c.*, 6 S. C. R. 308.

See *Gillies et al. v. McConochie*, 3 O. R. 203, p. 815.

10. Estate or Interest Taken by Trustees or Executors.

A testator devised to his wife for life a parcel of land "with the power of sale at any time during her life, subject to the consent of my executors." Three executors were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving executors was not sufficient:—Held that in the conflicting state of the authorities upon the question, the title was not one which the court would force upon a purchaser:—Held, also, that under such a power the land could be sold in parcels. *Re MacNabb*, 1 O. R., Chy. D. 94.

Where a testator, after devising certain lands to "my trusty friends J. L. and R. M." on certain trusts for the maintenance and education of his son, J. E., and devising the residue, real and personal, to the said "J. L. and R. M., or the survivor of them," in trust to sell, and distribute the proceeds in payment of certain legacies, therein specified, continued, "should there ultimately be any residue, I direct my said trustees, or the survivors of them, to divide and pay the same to and among my legatees hereinbefore named and my said trustees, or the survivor of them, in

even and equal shares and proportions"—Held, that the trustees took as a class, i. e., one share between them, equal to the shares taken respectively by the legatees; for looking at the whole will, it appeared that the testator was speaking of the trustees in their official capacity, and regarding them as one legal person. *Boys' Home of the City of Hamilton v. Lewis et al.*, 4 O. R., Chy. D. 18.

See *In re Romanes and Smith*, 8 P. R. 323, p. 798; *Givins v. Darvill*, 27 Chy. 502, p. 785; *Moore v. Mellish*, 3 O. R. 174, p. 810.

11. Investment of Securities.

The testator, a resident of Ontario, but temporarily resident in New York, was possessed of real and personal property in Ontario, and also of personal property invested in United States securities. By his will he named one resident of the United States (his brother-in-law) and two persons residents of Ontario, as his executors, to whom he bequeathed all his personal estate, upon trust as soon as conveniently might be to sell, call in and convert into money such part of his estate as should not consist of money, and therefore to make certain payments, and invest the balance of such moneys in or upon any of the public stocks or funds of the Dominion of Canada, of the Province of Ontario, or upon Canadian Government or real securities in the Province of Ontario, or in or upon the debentures of any municipality within the Province of Ontario aforesaid, or in or upon the shares, stocks, or securities of any bank, incorporated by Act of Parliament of Canada, paying a dividend, with power to vary the said stocks, funds, debentures, shares and securities: "And as respects my American securities, having the fullest confidence in the judgment and integrity of the said W. E. C., my brother-in-law and trustee, I direct my trustees to be guided entirely by his judgment as to the sale, disposal and re-investment thereof, or the permitting of the same to be and remain as they are, until maturity thereof, and I declare that my said trustees or trustee shall not be responsible for any loss to be occasioned thereby":—Held, that this did not authorize the re-investment of moneys realized on the sale, or maturing of any of these securities in the United States, but that the executors were bound to bring them into this country, and invest them in one or other of the securities enumerated by the testator. *Burritt v. Burritt*, 27 Chy. 143.

12. Annuities.

A testator bequeathed the annual income of all his estate, real and personal, to his widow during widowhood, subject to the payment of \$160 a-year to his father, and after the death of his father to his mother, and after the death of both his father and mother the said annuity of \$160 was given in equal shares to N. and J., a sister and niece of the testator, and he thereby made this annuity to his father and mother, as also the annuities to N. and J., a charge upon all his real estate; and directed his executors and trustees to pay or cause to be paid the net annual income of his estate ("after payment of the annuities as aforesaid") to his wife absolutely

during widowhood:—Held that in the event of the income of the estate proving insufficient to pay the annuities, the annuitants were entitled to have the same raised out of the corpus of the estate. *Jones v. Jones*, 27 Chy. 317.

J. R. died on the 3rd August, 1876, leaving a will dated 6th August, 1875, and a codicil dated 21st July, 1876. By the will he devised to his widow an annuity of \$10,000 for her life, which he declared to be in lieu of her dower. This annuity the testator directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property particularly described in five schedules marked respectively, A, B, C, D, and E, annexed to his will, upon these trusts, viz.:—Upon trust, during the life of his wife, to collect and receive the rents, issues and profits thereof which should be, and be taken to form a portion of his "general estate;" and then from and out of the general estate, during the life of the testator's wife, the executors were to pay to each of his five daughters the clear yearly sum of \$1,600 by equal quarterly payments, free from the debts, contracts and engagements of their respective husbands. Next, resuming the statement of the trusts of the schedule property specifically given the testator provided, that from and after the death of his wife, the trustees were to collect and receive the rents, issues, dividends and profits of the lands, &c., mentioned in the said schedules, and to pay to his daughter M. A. A., the rents &c., apportioned to her in schedule A; to his daughter E. of those mentioned in schedule B; to his daughter M. of those mentioned in schedule C; to his daughter A. of those mentioned in schedule D; and to his daughter L. of those mentioned in schedule E; each of said daughters being charged with the insurance, ground rents, rates and taxes, repairs and other expenses with or incidental to the management and upholding of the property apportioned to her, and the same being from time to time deducted from such quarterly payments. The will then directed the executors to keep the properties insured against loss by fire, and in case of total loss, it should be optional with the parties to whom the property was apportioned by the schedules, either to direct the insurance money to be applied in rebuilding, or to lease the property. It then declared what was to be done with the share of each of his daughters in case of her death. In the residuary clause of the will there were the following words: "The rest, residue and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give, devise, and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following:" He then gave out of the residue a legacy of \$4,000 to his brother D. R., and the ultimate residue he directed to be equally divided among his children upon the same trusts with regard to his daughters, as were thereinbefore declared, with respect to the said estate in the said schedules mentioned. The rents and profits of the whole estate left by the testator proved insufficient, after paying the annuity of \$10,000 to the widow and the rent of and taxes upon his house in L., to pay in full the several sums of \$1,600 a-year to each of the daughters during the life of their mother, and the question raised on this

appeal was, whether the executors and trustees had power to sell or mortgage any part of the corpus, or apply the funds of the corpus of the property, to make up the deficiency :—Held, on appeal, that the annuities given to the daughters, and the arrears of their annuities, were chargeable on the corpus of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity. *Almon v. Lewin*, 5 S. C. R. 514.

See *Edwards v. Pearson et al.*, 4 O. R. 514, p. 811.

13. Legacies.

(a) Satisfaction.

The testator by his will, made in July, 1877, devised to his son G., certain real estate and brewery, expressing that "this devise he accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease." In a subsequent clause: "L." the testator, declared that in the event of selling lands specifically devised, the proceeds were to be substituted for the lands by charging the proceeds against the real estate of the testator. The testator was indebted to G. in the sum of \$36,146.86, and on the 8th of October, 1879, the parties met and agreed that the testator should sell part of the lands devised to him, including the brewery, to G. for \$27,000, and the brewery plant for \$6,987.20, which was credited on G.'s claim against the testator. G. subsequently, under clause "L.," claimed against the estate of the testator payment of the amount for which the brewery premises and plant were sold, he swearing that he was ignorant of the contents of the will. Thereupon the plaintiffs, two of the executors and trustees, instituted proceedings seeking to obtain a construction of the will :—Held, reversing the judgment of the court below, that the agreement entered into between the father and son superseded the devise to the son. *Archer v. Severn*, 8 A. R. 725.

(b) Lapse.

The testator bequeathed an amount of personal estate to his brother John, "to have and to hold to him, his heirs and assigns, for ever." John predeceased the testator :—Held, that the legacy lapsed, and that the next of kin of the legatee was not entitled. *Mealey v. Aikins*, 27 Chy. 563.

(c) Abatement.

A testator bequeathed, "unto my sister M. J. such sum as will, together with what shall be at her credit in my books at Montreal, make \$6,000." At the time of the making of the will there was \$3,258.47 at M. J.'s credit, but subsequently the testator disposed of his business, and as part of the arrangement placed an additional sum of \$2,000 to M. J.'s credit, making the whole sum at her credit \$5,258.42: of this sum, \$3,000 was placed on a special account at interest, \$2,000 was agreed to be paid to her by the purchasers, and the balance, \$258.42, was paid in cash, and her account balanced in the books, leaving nothing at her credit :—Held, that M. J.'s legacy was to be reduced by the amount of testator's debt to her at the time of

his death; that what had taken place amounted to payment of the debt; and that she was entitled to the legacy of \$6,000. *Wilkes v. Wilkes*, 1 O. R., Chy. D. 131.

(d) Charged on Land.

A testator, after directing that his funeral charges and debts should be paid by his executor, disposed of his real and personal estate as follows: First, he gave and bequeathed certain legacies "to be paid out of my estate," and then he gave the residue and remainder of his estate, real and personal, to his son W. absolutely, and he nominated W. sole executor :—Held, that the legacies were, by the will, charged upon the estate, real and personal, and failing personal estate became a charge on the land; and that W. had power to sell the land, and a purchaser from him was not bound to see to the application of the purchase money. *Moore v. Mellish*, 3 O. R., Chy. D. 174.

See *Toomey v. Tracey*, 4 O. R. 708, p. 816.

(e) Demonstrative or Specific.

A testator by his will directed that "\$5,000 of the money which I may be entitled as my share of the partnership business now carried on at," &c., under the name of E. H. & Co., should be invested by his executors at interest, and that the income derived therefrom should by them be paid over, as received, to his daughter M., for her maintenance until she attained twenty-one, when she should be entitled to \$5,000; and if the interest in any year from the investment should fall short of \$400, the difference to make up that sum should be paid by his executors out of the interest or profits derived from the remainder of her estate. Subject as aforesaid, he gave the residue of his estate, real and personal, to his executors in trust for his son, &c. Subsequently to the making of the will the partnership of E. H. & Co. was dissolved, and the testator until his death carried on the business alone, but under the name of E. H. & Co., his interest in the partnership having been realized by him and carried into his new business :—Held, that the legacy of \$5,000 was demonstrative and not specific, and that she was entitled to be paid the same out of the general estate. *Day v. Harris*, 1 O. R., Chy. D. 147.

(f) Cumulative or Substitutional.

A testator, after making certain bequests to his wife, directed that after her death, his executors should sell all his estate, real and personal, and after providing for certain pecuniary legacies, should give the legal interest on one-fourth of the remaining proceeds of his estate to his daughter E., to be paid to her yearly during her life, and after her death to be divided among her surviving children. By a codicil he willed to "E. and her heirs that share or division of my estate, as referred to in a former will, in land composed of the north east part of lot 7, concession 3, Markham." It appeared that the testator had put E. in possession of the said fifty acres some time before his death, and that the said fifty acres were about equal to one-fourth of the

whole residue of his estate :—Held, that the devise to E. in the codicil was substitutional for the bequest to her in the will. Held, also, that under the codicil E. took an estate in fee, and not one subject to the incidents of the original gift in the will. In no case of substitutional gifts has it been held that the subsequent gift is to go to the parties entitled under the subsequent limitation of the former gift. The word "heirs" may sometimes mean "children," both in regard to personal and real estate, but that meaning will only be given to it when it is clear that the property was intended to go to the children. *Scott et al. v. Gohn et al.*, 4 O. R., Chy. D. 457.

A testator, after directing payment of his debts, and funeral and testamentary expenses, disposed of the residue as follows: "Secondly, I give to my wife \$150 annually, during her natural life, or so long as she may remain my widow, the said sum to be received and accepted by her in lieu of dower, the said yearly allowance to be a lien upon my real estate, and to be paid my said wife as she may need it, either quarterly or half-yearly." He then directed his executors to sell his farm and all his personal property except that previously disposed of, and out of the proceeds: first, to pay his debts, &c., as aforesaid; and to divide the balance then remaining between his sons, subject to each of them securing to their mother an annual payment of \$50 during her natural life, the security to be satisfactory to her and his executors :—Held, that there were sufficient points of difference between the first annuity and the subsequent ones, to make it apparent that the several annuities in favour of the widow were intended to be cumulative. *Ehwards v. Pearson et al.*, 4 O. R., Chy. D. 514.

(g) Conditional.

A. by the third clause of his will, devised and bequeathed the residue of his estate to his wife, four sons, and two daughters; the devise and bequest being subject to the condition that they should all unite in paying to the executors before the 1st of January, 1877, the sum of \$1,600, and the same sum before the 25th January, 1882, said sums to pay the shares of two of the sons, Alexander and Duncan. By the 4th clause he gave the sum of \$1,600 without condition, to Alexander and Duncan. By the 5th clause, he devised to his sons, Douglas and Oliver, two lots; and after giving several legacies to his daughters, he proceeded, "and further, that Alexander and Duncan work on the farm until their legacies become due." Alexander left the farm in 1871, and entered into mercantile pursuits :—Held, affirming the judgment of Proudfoot, V. C., Patterson, J. A. dissenting, that Alexander was entitled to the legacy absolutely, and that the direction that he should work on the farm, was not a condition precedent to his right thereto. *Davidson v. Oliver et al.*, 6 A. R. 595. Reversed on appeal to the Supreme Court.

(h) Interest on.

See *Toomey v. Tracey*, 4 O. R. 708, p. 816; *Cameron v. Campbell*, 7 A. R. 361, p. 439.

(i) Liability to Refund.

Held, in this case that although the sums overpaid to some of the legatees had been so paid with the sanction of the Court, but in a suit in which infants now claiming were not properly represented, that did not relieve the parties to whom such payments were made from refunding the amount, but under the circumstances the order for repayment should arrange the mode thereof so as to be as little burdensome as should appear to be consistent with justice to the parties entitled to receive the money. *Anderson v. Bell*, 8 A. R. 531.

14. Provisions for Support and Maintenance.

The testator by his will devised the proceeds of certain real estate to his daughter-in-law, E. D., widow of his son W. D., deceased, to her use and support of his son W. D.'s children during her natural life, or so long as she remained his widow; and in the event of the death of his said daughter-in-law, then to his grandchildren so long as they remained minors. He then devised the land to his grandson P. D., in fee, but subject to the above devise. After the testator's death E. D. married again, and was still living :—Held, that the intent of the testator was, that in any event the minors were to have the support of the land during minority, and therefore were so entitled during such minority, upon the determination of the mother's estate by marriage as well as by death. *Henry v. Gilleece*, 31 C. P. 243.

A testator devised certain lands to his two sons, declaring that the legacies thereafter mentioned should be a charge thereon. He then bequeathed certain pecuniary legacies to his daughters, adding, "I give and devise also unto [his said daughters] their support and maintenance so long as they, or either of them, remain at home with [his two sons];" and he gave his personal property to his two sons in equal shares :—Held, that the support and maintenance of the plaintiffs was, by the will, made a charge upon the lands; and they might for sufficient reasons, cease to live at home, and yet still be entitled to such support and maintenance. *Swainson v. Bentley*, 4 O. R., Chy. D. 572.

See *Givins v. Darvill*, 27 Chy. 502, p. 785; *McGarry v. Thompson*, 29 Chy. 287, p. 806.

15. Power of Appointment.

The decree in this cause (28 Chy. 150,) reversed so far as the will was declared void, on the ground of insane delusion. The testator, under the provisions of his father's will, had the power of appointing his share of his father's estate among his children or to his brother or sister. By his will the testator gave portions, about one-fourth of his estate, to two of his children, and as to the residue he appointed the same to his brother C. T. B., desiring him to pay first his (testator's) indebtedness to his father's estate, and to release his policy of life insurance from such indebtedness, and then gave and bequeathed to a stranger the policy of assurance upon his life for \$3,000, and all moneys arising therefrom :—Held, that as to the portions of his estate given to his two children the will was valid; but as to the ap-

pointment to his brother, the same was void as being a fraudulent exercise of the power of appointment; and therefore that as to the residue after payment of the amounts given to the two children the will was inoperative and void, and that as to so much there was an intestacy. *Bell v. Lee*, 8 A. R. 185.

16. Conditions in Restraint of Alienation.

A direction in a devise in fee simple that the devisee should "not sell, or cause to be sold, the above named lot, or any part thereof, during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper;"—Held, a valid restraint upon alienation:—Held, also, that the giving of a mortgage by the devisee was not a violation of the restraint. *Smith v. Faught et al.*, 45 Q. B. 484.

The testator directed that his wife should have the use and control of all his property real and personal until his two sons W. & H. should come of age or until the said property is disposed of as hereinafter mentioned. He devised to each of these sons one-half of his farm, to be possessed by them when respectively of the full age of twenty-one. He then gave to his five daughters certain pecuniary legacies to be paid by each of his said sons within specified periods after their possessing the property, and directed them to give his wife a comfortable support, or £10 each annually during her life; and the will then proceeded; "I also will and direct that my above named sons W. & H. do not sell or transfer the said property without the written consent of my said wife during her life." The will was registered. After attaining twenty-one, H. mortgaged his share without his mother's consent, to the defendants C. & M., who sold on default in the mortgage to the defendant O., who purchased as trustee for M., with full knowledge of the state of the title. Upon a bill filed by the heirs-at-law:—Held, affirming the decree of Blake, V. C., (27 Chy. 161,) that the restriction upon alienation was valid, and was a condition, the breach of which worked a forfeiture, but that the heirs took the land in question charged with payment of the annuity and the legacies. The question whether the mortgage was necessarily a breach of the condition was raised in the argument, but not in the answer, and was not decided. *Earls v. McAlpine*, 6 A. R. 145.

See *Givins v. Darvill*, 27 Chy. 502, p. 785.

17. Election.

(a) By Heir.

Where, by a will, land is devised to an attesting witness, there is an intestacy as to this devise by virtue of the 26 Geo. II. c. 6, s. 1, and the heir is not bound to elect as between this land and a legacy bequeathed to him by the will. *Munsie v. Lindsay*, 1 O. R., Chy. D. 164.

18. Giving Right to Purchase.

A testator directed that "in case any one of the above named three legatees be able and willing to buy the farm, as aforesaid, at the price of \$4,000, my executors hereafter named shall

so sell said farm." Each of the three legatees claimed the right to purchase the farm:—Held, under these circumstances, that the executors were precluded from carrying out this direction of the will, and that they must sell the estate and divide the proceeds between the parties interested, according to another provision of the will. *Jeffrey v. Scott*, 27 Chy. 314.

The testator was seized of certain lands which were subject to incumbrances, and by his will directed the same to be sold if his sons in succession should not redeem. One of the sons, R., to whom the first privilege of redeeming was given, availed himself thereof, and redeemed the property, which was subject to certain charges imposed by the will, in addition to the incumbrances:—Held, that the right to redeem was in effect a right to purchase, as the mortgages and charges created by the will amounted to about as much as the land was worth; and that R. had acquired a good title free from any claim of his brothers; and his brothers having instituted proceedings against him claiming an interest in the estate that he was entitled to recover his costs, not out of the estate of the testator but from the plaintiffs personally. *Stevenson v. Stevenson*, 28 Chy. 232.

19. Void Devises or Bequests.

(a) To Religious or Charitable Uses.

Three weeks before the testator died he made his will, whereby he directed his lands to be sold, and out of the proceeds gave \$2000 to his widow in lieu of dower and further directed that "all moneys then remaining in the hands of my executors shall be divided between the following funds," naming five different charities in connection with the Canada Presbyterian Church—such "money to be divided in whichever way my executors may think best"—Held, that the bequests to the charities were void under the Mortmain Acts; and there being no residuary clause the bequests so failing to take effect went to the heirs-at-law, not to the next of kin of the testator; costs of all parties to be paid out of the estate. *Re Trusts of John McDonald's Will*, 29 Chy. 241.

The residuary estate in this case consisted of mortgages, the bequest of which, under the Mortmain Act, was declared invalid, and to belong to the next of kin of the testator, the plaintiff in the suit. *Thomson v. Torrance et al.*, 28 Chy. 253. Affirmed 9 A. R. 1.

A will dated the 1st April, 1880, contained this clause:—"I will and desire that the residue of my real and personal estate, being the sum of \$2,800, more or less, shall be paid to the four Churches of England, in the townships of Orford and Howard, in four equal parts to each such churches as follows: to Trinity Church, Howard; St. John's Church, Morpeth; St. — Church, Highgate, and the proposed new church at Clearville, and to be applied by my executors in the payment of any debt or debts upon each of such churches respectively; and in case of no debt, or there being a balance or residue after the payment of such debt or debts on each of such churches, respectively, then the residue (if any) is to be paid by my executors to the church-

wardens of such church, to be held by them in trust; and said money is to be invested by such churchwardens, and the interest arising therefrom is to be paid to the incumbent of said church as a portion of his salary or stipend." The testator died on the 10th of the same month. Upon a special case stated for the opinion of the court, it was shewn that there was a large debt existing on the Morpeth church for money borrowed on mortgage wherewith to pay off the building debt. The church at Clearville was not built at the time of the testator's death, but some debts were existing in respect of materials and work on the foundation:—Held, (1) that the mortgage debt on the Morpeth church could not be considered as a building debt; but if it could be so considered the bequest to pay the same would be void, under the statutes of Mortmain. (2) That as to the Clearville church, which was in course of erection, the building debts would form a lien on the lands from the beginning of the work under the Mechanics' Lien Act, and the bequest to pay off those debts would therefore be void, unless the work was being performed in such a manner as excluded the creation of a lien on the land. (3) That the bequest for the benefit of the incumbent would have been void if the investment had been directed to be made upon realty; but as the trust might be carried out by investing in personalty the bequest was valid if so invested. (4) That the amount to which the incumbent would be entitled was the residue after deducting the void bequests for debts. *Stewart v. Gesner*, 29 Chy. 329.

A testator, a minister of the United Presbyterian Church of North America, after bequeathing \$1,000 to the said Church, proceeded as follows: "I give for a Jewish Mission \$1,000 to that church which is sound and evangelical in doctrine and pure in worship, using the songs of praise, the inspired book which can unite all nations," &c. The evidence shewed that this description applied to the said church:—Held, not void for uncertainty, for that the testator clearly intended the said Church as the legatee. *Gillies et al. v. McConochie*, 3 O. R., Chy. D. 203.

The testator then proceeded thus: "To the pious poor converted Jews that meet together for the reading of the scriptures for their instruction and mental edification I leave \$1,000:—" Held, a good charitable bequest and not void for uncertainty. *Id.*

Lastly, the testator gave "the balance" of his estate "to the poor and destitute, to supply their wants in food and raiment:—" Held, a valid bequest so far as the residue consisted of personalty, and an inquiry was directed to guide the Court in the application of the fund. *Id.*

A testator, after directing payment of his debts out of his personal property, or if that should prove insufficient, then, that so much of his real estate as would supply the deficiency might be sold for that purpose, went on to direct that his land should be sold, and the income of the capital arising from the sale be paid yearly to his wife, for her maintenance during her natural life, after which he gave a number of charitable bequests and pecuniary legacies, but made no residuary gift:—Held, that the testator had created a mixed fund to answer the purposes of

his will, and if the personalty was not sufficient for the payment of the debts, the legacies were payable out of the land; if it was sufficient, they were payable out of the mixed fund; but so far as the charitable bequests were payable out of the land they were void:—Held, also, that interest was payable on the legacies from a year after the testator's death, in accordance with the general rule, in any event; and this, although as the whole interest of the proceeds of the land was given to the wife for life, the capital had to be kept invested by the executors; and, consequently, there was no fund for the payment of legacies until her death. *Toomey v. Tracey*, 4 O. R., Chy. D. 708.

See *Roy v. The Annual Conference of New Brunswick and Prince Edward Island*, 6 S. C. R. 308, p. 806; *McCleneghan v. Grey*, 4 O. R. 329, pp. 109, 110.

(b) To Attesting Witness.

A testator devised land, subject to a lease, to J. H. in fee, and as to the rent directed half to be paid to J. H., and half to the executor in trust for J. H. The executor, assuming the devise to be valid, paid all the rent to J. H. The latter executed a deed of the land to C. H., to whom he afterwards paid the rent with the privity of the executor, as soon as he received it from him. C. H. went into possession of the land after the expiration of the lease, and had been so receiving rent or in possession for more than ten years before action commenced. J. H. was a witness to the will:—Held, (affirming the decision of Proudfoot, J.), that the devise of rent was void under 25 Geo. II. c. 6, s. 1, as J. H. was the beneficial devisee of the whole of it. *Hopkins v. Hopkins et al.*, 3 O. R., Chy. D. 223.

See *Munsie v. Lindsay*, 1 O. R. 164, p. 813.

(c) To Foreign State.

A testator directed his executors to pay and deliver the residue of his estate to the Government and Legislature of the State of Vermont, to be disposed of as to them should seem best, having regard to certain recommendations set forth in the will:—Held, (affirming the decree, 27 Chy. 361,) that the State was sufficiently designated as the legatee to entitle it to take the bequest; and the fact that the bequest was for the benefit of, and to take effect in a foreign country, could not be urged as an objection to its validity; neither could the objection that the State could not be made amenable to the Courts of the State, and thus there would not be any supervision of the trusts, as it must be assumed that a sovereign State would not do anything to violate a trust; besides, which it appeared that the Legislature was not, in reality, to assume the trust, their duty being to appoint trustees who would be amenable to the Courts:—Held, also, that the direction for accumulation did not render the bequest invalid, it being for the Courts in Vermont to say whether the direction should be carried out. *Parkhurst v. Roy*, 7 A. R. 614.

20. Perpetuities.

See *Parkhurst v. Roy*, 7 A. R. 614, *supra*.

21. *Forfeiture of Devise.*

Earls v. McAlpine, 6 A. R. 145, p. 813.

V. COSTS OF CONTESTING AND CONSTRUING WILLS.

The rule is, that if there exist "sufficient and reasonable ground, looking at the knowledge and means of knowledge of the opposing party, to question either the execution of a will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of the successful party." This rule was acted upon, and the plaintiff relieved from costs in a case where the plaintiff had seen the deceased the day after the will was executed, and found him very low and unable to speak intelligibly, and where the testator had to several persons spoken approvingly of the conduct of the plaintiff, a son of a deceased brother, and had expressed himself in such a manner as induced the plaintiff and others to believe that he would become a beneficiary under his uncle's will, in which his name was not mentioned, and which had been prepared at the house of the widow of another brother of the testator, where he had for some time been residing, and was taken ill and died, although at the hearing the plaintiff's case entirely failed in proof. *Macaulay v. Kemp*, 27 Chy. 442.

The court ordered that the costs in this case should be paid by the respondents (executors and trustees of the will) out of the general residue of the estate of the deceased, but if the said residue should have been distributed then the said costs should be contributed by the persons who should have received portions of the said residue ratably according to the amounts of the respective sums received by them. *Fisher v. Anderson*, 4 S. C. R. 406, 429.

VI. MISCELLANEOUS CASES.

Forfeiture of legacy by executor. See *Kenedy v. Pingle*, 27 Chy. 305, p. 274.

Where one to whom a devise prima facie beneficial to him is made, neither accepts nor rejects the same, but remains passive, he will be presumed to accept. *Re Defoe*, 2 O. R., Chy. D. 623.

See *Re Bender*, 8 P. R. 399, p. 332; *Re Dunham*, 29 Chy. 258, p. 433; *Cameron v. Campbell*, 7 A. R. 361, p. 439.

WITNESS.

See EVIDENCE.—WILL.

WORDS AND TERMS.

I. MAXIMS.—See MAXIMS.

II. IN ACTS RELATING TO CONTROVERTED ELECTIONS — See PARLIAMENTARY ELECTIONS.

III. WILLS.—See WILLS.

"According to the present practice of the Court of Chancery."—See *Barker v. Furze*, 9 P. R. 83, p. 765.

"Adverse claim."—See *O'Grady v. McCaffray*, 2 O. R. 309, p. 195.

"Adjoining local municipality."—See *Re Gallerno and Township of Rochester*, 46 Q. B. 279, p. 488.

"Alleged."—See *Owston v. Grand Trunk R. W. Co.*, 28 Chy. 428, p. 618.

"Assumed."—See *Owston v. Grand Trunk R. W. Co.*, 28 Chy. 428, p. 618.

"Bazaar patterns."—See *McCall v. Theat*, 28 Chy. 48, p. 345.

"Be the same more or less."—See *Nelles v. White*, 29 Chy. 338, p. 29.

"Bonus."—See *Scottish American Investment Co. v. The Village of Elora*, 6 A. R. 628, p. 486.

"Change."—See *Gill v. Canada Fire and Marine Ins. Co.*, 1 O. R. 341, p. 360.

"Contract."—See *Smith v. Harrington*, 29 Chy. 502, p. 62.

"Contractor."—See *Petrie v. Hunter*, 2 O. R. 233, p. 420.

"Decision."—See *Danjou v. Marquis*, 3 S. C. R. 251, p. 262.

"Demise." "Demise and lease."—See *Spears v. Miller*, 32 C. P. 661, p. 234.

"Due diligence."—See *Neill v. Travellers Ins. Co.*, 31 C. P. 394, p. 381.

"Effectually prosecute."—See *International Bridge Co. v. Canada Southern R. W. Co.*, 9 P. R. 250, p. 658.

"Either party."—See *McLean v. Thompson et al.*, 9 P. R. 553, p. 765.

"Execution creditors."—See *Macfie v. Hunter*, 9 P. R. 149, p. 217.

"Feloniously."—See *Regina v. Gough*, 3 O. R. 402, p. 187.

"Felony, to wit larceny."—See *Regina v. McHolme*, 8 P. R. 452, p. 21.

"Fieri facias."—See *Macfie v. Hunter*, 9 P. R. 149, p. 217.

"Forthwith" in sec. 3, of 43 Vict., c. 58 (D), means after the meeting of the provisional directors, and not forthwith after the passing of the Act. *McLaren v. Fiskens*, 28 Chy. 352.

"From."—See *In re Bronson and the City of Ottawa*, 1 O. R. 415, p. 692.

"From and after."—See *In re McAlpine and the Township of Euphemia*, 45 Q. B. 199, p. 662.

"Given security before a judge."—See *Re Union Fire Ins. Co.*, 7 A. R. 783, p. 151.

"Good merchantable timber."—See *Clarke v. White*, 3 S. C. R. 309, p. 756.

"Grocery."—See *Nicholson v. Phoenix Ins. Co.*, 45 Q. B. 359, p. 355.

"Highest court of final resort."—See *Danjou v. Marquis*, 3 S. C. R. 251, p. 446.

"Imprisonment."—See *Hodge v. The Queen*, 9 App. Cas. 117, p. 120.

"In bond."—See *May v. Security Loan & Savings Co.*, 45 Q. B. 106, p. 88.

"In the premises."—See *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197, p. 685.

"Incendiarism."—See *Campbell v. Victoria Mutual Fire Ins. Co.*, 45 Q. B. 412, p. 362.

"Income."—See *Lawless v. Sullivan*, 6 App. Cas. 373, p. 24.

"Judge."—See *In re Leibes v. Ward*, 45 Q. B. 375, p. 220.

"Lands, mines, minerals and royalties."—See *The Attorney General of Ontario v. Mercer*, 8 App. Cas. 767, p. 121.

"Lien-holders of the same class."—See *McPherson v. Gedge*, 4 O. R. 246, p. 420.

"Loan of money."—See *Bank of Toronto v. Beaver & Toronto Mutual Ins. Co.*, 28 Chy. 87, p. 373.

"M. D."—See *Regina v. Tefft*, 45 Q. B. 144, p. 452.

"May."—See *Aitchison v. Mann*, 9 P. R. 473, p. 587.

"Middle of the main channel."—See *Regina v. The Corporation of the County of Carleton*, 1 O. R. 277, p. 792.

"Mode of chance."—See *Regina v. Dodds*, 4 O. R. 390, p. 309.

"Mortgagee in possession."—See *Court v. Holland*, 29 Chy. 19, p. 460.

"Next sittings of the court."—See *Chapman v. Smith*, 32 C. P. 555, p. 633.

"Not less than thirty days' notice."—See *National Ins. Co. v. Egleson*, 29 Chy. 406, p. 136.

"Not otherwise or elsewhere."—See *Court v. Scott*, 32 C. P. 148, p. 397.

"Northwards."—See *Ferguson v. Freeman*, 27 Chy. 211, p. 201.

"On demand."—See *Davies v. Funston*, 45 Q. B. 369, p. 253.

"On view."—See *Mowat v. McFee*, 5 S. C. R. 66, p. 281.

"Opposite or interested party in the suit."—See *Watson v. Severn et al.*, 6 A. R. 559, p. 260.

"Party adverse in point of interest."—See *Moore v. Boyd*, 8 P. R. 413, p. 247.

"Party interested."—See *Hughes v. Hughes*, 6 A. R. 373, p. 275.

"Personal Wrongs."—See *Beninger v. Thrasher*, 9 P. R. 206; 1 O. R. 313.

"Premises."—See *Saylor v. Cooper* 2 O. R. 398, p. 787.

"Profits."—See *Workman v. Robb*, 7 A. R. 389, p. 425.

"Purely money demand."—See *Gowanlock v. Manns*, 9 P. R. 270, p. 181; *Green v. Hamilton Provident Loan Co.*, 31 C. P. 574, p. 469.

Sale of goods "to arrive."—See *Fleury v. Copland*, 46 Q. B. 36, p. 714.

"Seal."—See *Re Bell and Black*, 1 O. R. 125, p. 201.

"Shareholders."—See *Hendrie v. The Grand Trunk R. W. Co. of Canada*, 2 O. R. 441, p. 687.

"Special business."—See *Marsh v. Huron College*, 27 Chy. 605, p. 146.

"Special circumstance."—See ATTORNEY AND SOLICITOR, VI. 2 (b), p. 44.

"There be no representatives admitted amongst collaterals after brothers' and sisters' children."—See *Crowther et al. v. Cawthra et al.*, 1 O. R. 128, p. 208.

"Traction engines."—See *Corporation of the County of York v. The Toronto Gravel Road and Concrete Co.*, 3 O. R. 584, p. 129.

"Trade and commerce."—See CONSTITUTIONAL LAW, II. 2, p. 115.

"Trader."—See BANKRUPTCY AND INSOLVENCY, II. 2, p. 55.

"Transient trader."—See *Regina v. Outhbert*, 45 Q. B. 19, p. 490.

"Travellers."—See *Regina v. Daggett*, 1 O. R. 537, p. 744.

"Unlawful act."—See *Neill v. Travellers Ins. Co.*, 31 C. P. 394, p. 381.

"Upon payment of costs."—See *Stuart v. Branton et al.*, 9 P. R. 566, p. 165.

"Vendor."—See *Wilmot v. Stalker*, 2 O. R. 78, p. 717.

"Vessel to go out in tow."—See *The Provincial Ins. Co. of Canada v. Connolly*, 5 S. C. R. 258, p. 382.

"Voluntary."—See *Stewart et al. v. Tremain et al.*, 3 O. R. 190, p. 299.

"Warrant of execution."—See *Macfie v. Hunter*, 9 P. R. 149, p. 217.

"Whether such ships or vessels be at home or abroad at the time of assessment."—See *City of Halifax v. Kenny*, 3 S. C. R. 497, p. 737.

"With intent to do grievous bodily harm."—See *Regina v. Boucher*, 8 P. R. 20, p. 187.

"With or without security."—See *O'Brien et al. v. Clarkson*, 2 O. R. 525, p. 54.

"Wrongful."—See *Hopkins v. Hopkins et al.*, 3 O. R. 223, p. 436.

WORK AND LABOUR.

I. EXTRAS, 820.

II. PERFORMANCE, 821.

III. REMUNERATION, 822.

I. EXTRAS.

The suppliant engaged by contract under seal, dated 4th December, 1872, with the minister of public works, to construct, finish and complete, for a lump sum of \$78,000, a deep sea wharf at Richmond station at Halifax, N. S., agreeably to the plans in the engineer's office and specif-

cations, and with such directions as should be given by the engineer in charge during the progress of the work. By the 7th clause of the contract no extra work could be performed, unless "ordered in writing by the engineer in charge before the execution of the work." By letter, dated 26th August, 1873, the minister of public works authorized the suppliant to make an addition to the wharf by the erection of a superstructure to be used as a coal floor, for the additional sum of \$18,400. Further extra work which amounted to \$2,781, was performed under another letter from the public works department. The work was completed and on the final certificate of the government engineer in charge of the works, the sum of \$9,681, as the balance due, was paid to the suppliant, who gave the following receipt, dated 30th April, 1875: "Received from the Intercolonial railway, in full, for all amounts against the government for works under contract, as follows: 'Richmond deep water wharf works for storage of coals, work for bracing wharf, rebuilding two stone cribs, the sum of \$. . .'. The suppliant sued for extra work, which he alleged was not covered by the payment made on the 30th April, 1875, and also for damages caused to him by deficiency in and irregularity of payments. The petition was dismissed with costs; and a rule nisi for a new trial was subsequently moved for and discharged:—Held, affirming the judgment of the court below, that all the work performed by the suppliant for the government was either contract work within the plans or specifications, or extra work within the meaning of the 7th clause of the contract, and that he was paid in full the contract price, and also the price of all extra work for which he could produce written authority, and that written authority of the engineer and the estimate of the value of the work are conditions precedent to the right of the suppliant to recover payment for any other extra work. (Henry, J., dissenting.) *O'Brien v. The Queen*, 4 S. C. R. 529.

Per Ritchie, C. J., that neither the engineer, nor the clerk of the works nor any subordinate officer in charge of any of the works of the Dominion of Canada, have any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specially authorized by the express terms of contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract. *Id.*

II. PERFORMANCE.

L. sued N. et al. to recover from them, under specially endorsed writ, the balance of account due under and in pursuance of an agreement under seal providing that "L. was to run according to his best art and skill a tunnel of 200 feet for the sum of \$4 per running foot; that \$150 should be advanced on account of the contract, the balance to be paid on the satisfactory completion of the work." L. made five tunnels, none of which were 200 feet, but claimed he had done in all 204 feet. In addition to the count on the agreement the plaintiff inserted in his declaration the common counts for work and labour:—Held that there was not a sufficient fulfilment of the agreement, and inasmuch as L. had given no

particulars nor any evidence under the indebtedness counts, the rule absolute of the court below, ordering judgment to be entered for the defendants, should be affirmed and the appeal dismissed with costs. *Lakin v. Nuttall*, 3 S. C. R. 685.

Where a contractor for the building of a house made default in carrying on the work, and, in consequence, the owner, acting under a clause in the contract to that effect, dismissed him, and agreed verbally with a sub-contractor, who had been employed by the contractor, that if the sub-contractor would go on and finish the work he, the owner, would pay him:—Held, that the sub-contractor was entitled to a lien for all work done under such agreement as a "contractor," and as to such work he was no longer in the position of a sub-contractor:—Held, also, that the sub-contractor, acting under such an agreement, was not bound by clauses contained in the original contract with the dismissed contractor, providing for forfeiture, &c. *Petrie v. Hunter et al.*; *Guest et al. v. Hunter et al.*, 2 O. R., Chy. D. 233.

See next sub-head.

III. REMUNERATION.

The defendant agreed with the plaintiffs to sink an artesian well at seventy-five cents a foot. After sinking a distance of 160 feet, he met with an impediment, and refused to proceed further:—Held, reversing the decision of the County Court, that he was entitled to be paid for the work done, as the evidence did not shew an agreement that he should receive nothing unless he succeeded in finding water. Quare, whether evidence as to how contracts for artesian wells were usually made in Barrie should have been received. *The Barrie Gas Co. v. Sullivan*, 5 A. R. 110.

Held, that the nonproduction of an architect's certificate approving of the work done, though required by the contract with the dismissed contractor, as a condition precedent to payment, did not preclude the sub-contractor from recovering under the verbal agreement, provided the work was so done as to morally entitle him to such certificate, following *Lewis v. Hoare*, 44 L. T. N. S. 66. *Petrie v. Hunter et al.*, *Guest et al. v. Hunter et al.*, 2 O. R., Chy. D. 233.

It was stipulated that twenty per cent. of the contract price should not be payable until thirty days after the architect should have accepted the work, and that the balance of the contract price so to be retained should not be payable until all the sub-contractors were fully paid and settled with:—Held, 1. That no trust was thereby created in favour of the sub-contractors as to the sum agreed to be retained; and the contractor having assigned his interest in the contract to a third party, and the committee having waived their right to insist that the sub-contractors should be paid:—Held, 2. That the assignee was entitled to receive the twenty per cent. to the exclusion of the sub-contractors. *Forhan v. Lalonde*, 27 Chy. 600.

As to recovery of work done if expenditure unauthorized by parliament. See *Wood v. The Queen*, 7 S. C. R. 634, p. 596.

Certificate of engineer as a condition precedent to right of recovery. See *Isbester v. The Queen*, 7 S. C. R. 696, p. 595; *Jones v. The Queen*, 7 S. C. R. 570, p. 594.

See *McDonald v. Oliver et al.*, 3 O. R. 310, p. 128.

WOUNDING.

See CRIMINAL LAW.

WRITS.

I. OF ARREST—See WRIT OF ARREST.

II. CAPIAS—See ARREST.

III. OF EXECUTION—See EXECUTION.

IV. OF SUMMONS—See PRACTICE.

V. NE EXEAT—See NE EXEAT.

VI. QUO WARRANTO—See MUNICIPAL CORPORATIONS.

VII. REVIVOR—See SCIRE FACIAS AND REVIVOR.

VIII. SCIRE FACIAS—See SCIRE FACIAS AND REVIVOR.

WRIT OF ARREST.

A writ of arrest will not be granted against the purchaser in a suit for specific performance, unless it be shewn by affidavit that the vendor's lien is insufficient. *Nelson v. Dafoe*, 8 P. R. 332.—Proudfoot.

Where, under a writ of arrest a caption takes place, the sheriff is entitled to a bond for double the amount marked upon the writ. *Needham v. Needham*, 29 Chy. 117. See *S. C.*, p. 328.

